THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

OF CASES DECIDED IN

THE HOUSE OF LORDS. THE PRIVY COUNCIL.

ALL DIVISIONS OF THE SUPREME COURT

AND

COURTS OF SPECIAL JURISDICTION

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Bellotti *v.* Chequers Developments, Ltd. Read W. Russell Lawrence for W. Russell in l. 8 from bottom of p. 89.
Interoven Stove Co. *v.* Hibbard. Read King Hamilton and Green for the plaintiffs and Bullen, Debenham, Harston & Bennett for the defendants, on p. 271.
Drake *v.* Gray. On p. 372 for covenantees read covenantors, and on p. 374, l. 20, for sold read settled.
Hatherton *v.* Inland Revenue Comrs. On p. 608 the reference to Halsbury, Hailsham Edn., should be to Vol. 20.
Inland Revenue Comrs. *v.* New Sharlston Collieries. On p. 803 the reference to Elliott *v.* Burn should be [1935] A.C. 84.

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THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

CROZIER *v.* WISHART & COMPANY LIMITED AND WESTERN PRINTING SERVICES LIMITED.

[COURT OF APPEAL (Slesser and Scott, L.JJ.), **January 20, 21, 29, 1936.**]

Discovery—Interrogatories—Libel—Author not a party—Printer's information as to state of author's mind at date of publication.

The plaintiff sued for libel the printers and publishers of a book containing what he alleged to be matter defamatory of him, but did not join the author as a defendant. He sought to interrogate the defendant as to the information possessed by the author which had induced the author to believe that the expressions of opinion contained in the matter complained of (which the defendants pleaded were fair comment) were true.

HELD: the defendants could not be required to make further enquiries as to information which might have been received by the author since the date of publication, or as to information which the author had possessed before or at the date of publication and which, in fact, he had never communicated to the defendants; and that the interrogatories must be limited to asking for such information as to the state of the author's mind as was in the possession of the defendants at the moment of publication.

[**EDITORIAL NOTE.** So far as libel is concerned, the law here laid down seems to be new and uncovered by previous authority. Taking interrogatories generally, however, it is an extension of the doctrine laid down in *Bolckow* v. *Fisher* (1882) 10 Q.B.D. 161; 18 DIGEST 229, *1752*, and an extension in a negative sense. That authority settled that a principal could be interrogated as to the knowledge of his servants and agents and restricted that doctrine to such time as they were under his control, and this case extends the latter part of the doctrine to the particular circumstances of a libel action where the author is not sued

FOR THE LAW ON THE POINT, see HALSBURY, Vol. 10, pp. 417, 427, and FOR THE CASES see DIGEST Vol. 18, pp. 208, 228, 229.]

Cases referred to :

(1) *Smith* v. *Streatfeild* [1913] 3 K.B. 764; 32 Digest 155, *1876*.
(2) *Thomas* v. *Bradbury, Agnew & Co., Ltd.* [1906] 2 K.B. 627; 32 Digest 162, *1955*.
(3) *Robertson* v. *Wylde* (1838) 2 Mood. & R. 101; 32 Digest 163, *1983*.
(4) *Bolckow* v. *Fisher* (1882) 10 Q.B.D. 161; 18 Digest 229, *1752*.
(5) *McMeckan* v. *Aitken* (1895) 21 V.L.R. 65; 10 Digest 868, case *q*.
(6) *Clark* v. *Newsam* (1847) 1 Exch. 131; 42 Digest 975, *62*.
(7) *Hennessy* v. *Wright* (1888) 24 Q.B.D. 445 *n*; 32 Digest 149, *1804*.

Appeal by the defendants from an order of Greaves-Lord, J., dated Jan. 9, 1936, dismissing with costs an appeal of the defendants against an order of Master Jelf, dated Dec. 20, 1935, ordering that the plaintiff be at liberty to deliver to the defendants interrogatories in writing as initialled by the Master and that the defendants answer the interrogatories by Jan. 11, 1936.

The plaintiff, a retired brigadier-general, brought an action against the printers and publishers, but not against the author, of a book entitled "As the Fool." He alleged that the book contained matter defamatory of him as former commandant of the Auxiliary Division of the Royal Irish Constabulary in Dublin. The defendants pleaded that the words complained of were not capable of bearing any defamatory meaning; that in so far as the words consisted of statements of fact they were in their natural and ordinary meaning true in substance and in fact: and in so far as the words consisted of expression of opinion they were fair comment made in good faith and without malice upon the said facts, which were matters of public interest.

The plaintiff asked leave to deliver interrogatories as follows:

(1) What information had you when in the case of the second defendants you printed and/or caused to be printed and in the case of the first defendants you published and/or caused to be published (and what information had Francis Plunkett when he wrote) the words complained of by the plaintiff in this action which induced you (and/or the said Plunkett) and which of you to believe that the expressions of opinions or any and which of them in the said words contained and which you allege in paragraph 6 of the defence herein are fair comment made in good faith and without malice were true?

(2) State what steps if any you (and/or the said Plunkett) and which of you took before in the case of the second defendants printing and/or causing to be printed and in the case of the first defendants publishing and/or causing to be published (and in the case of the said Plunkett writing) the said opinions to test the said information and ascertain whether the said opinions or any and which of them were founded upon fact.

(3) Did you (and/or the said Plunkett) and which of you believe the said information or some and which part of it to be true?

He obtained leave to deliver these interrogatories from Master Jelf on Dec. 20, 1935. The defendants' appeal against this order was heard by Greaves-Lord, J., at chambers on Jan. 9, 1936, and dismissed.

R. P. Croom-Johnson, K.C., and *J. LhindPratt*, for the appellants, the publishers and printers of the alleged libel.

H. C. Leon and *Sir James Henry* for the respondent, Brigadier-General Crozier.

Pratt: An interrogatory may ask for information possessed by a

person other than the party to whom it is addressed only if that person is a servant or agent of the party.

SLESSER, L.J.: If a joint tortfeasor with the party has been malicious, his malice may be an answer to the party's plea of privilege.

SCOTT, L.J.: An interrogatory concerning information possessed by a joint tortfeasor may not be irrelevant, but its form may be oppressive. To ask the publisher or printer simply what was in the mind of the writer at the time of joint publication is oppressive, because neither defendant can know unless he has received information. The unoppressive form of the interrogatory would therefore be: What information had you as to the mind of the writer at the material moment?

SLESSER, L.J., referred to the words of ROLFE, B., in *Clark* v. *Newsam* (6) "When two persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained by their common act. In *Smith* v. *Streatfeild* (1) at p. 769 BANKES, J., referring to this statement of the law, added "In my opinion it follows from this rule of law that in the case of a joint publication of a libel each tortfeasor is liable for the malice of the other."

Pratt challenged the proposition, and submitted that if it were wrong the foundation for the interrogatory disappeared. He agreed, however, that if the interrogatory were limited to information as to the author's state of mind possessed by the defendant at the moment of publication, he would not object on the ground that the defendants were not liable for the malice of the author.

Leon claimed that he was entitled to ask the defendants whether or not the author had in fact been malicious. He referred to *Hennessy* v. *Wright* (No. 2) (7).

The Court did not call on *Pratt* to reply.

SLESSER, L.J.: This is a question whether certain interrogatories should be allowed in an action for libel. The action is brought by Brigadier-General Frank Percy Crozier against Wishart & Company, Limited, and Western Printing Services Limited, the printers and publishers of a book which is alleged to contain defamatory matter. The book, which is called "As a Fool," was written by one Francis Plunkett, and Mr. Francis Plunkett is not made a party to these proceedings. In the course of the case it was argued before us as a part of the arguments Mr. Leon adduced to maintain these interrogatories, that the authorities had established that the malice, if proved at the trial, of a joint tortfeasor, the author of this alleged defamatory matter, might be material in upsetting what otherwise would be a privilege in a plea of fair comment by the defendants, and that Mr. Plunkett's malice might be imputed to them. It was pointed out by the Court that no sufficient allegation to that effect appeared upon the record. The case was adjourned, and Mr. Leon duly replied to the defendants alleging, after joining issue, that the

words complained of in paragraph (4) of the statement of claim were written by Francis Plunkett falsely and maliciously and with the intention that they should be published by the first defendants and printed by the second defendants in the book "As the Fool."

In my view, when these interrogatories are rightly considered, it does not become necessary at this stage to express any conclusive opinion on the question of the malice of the joint tortfeasor in upsetting the privilege of one of the defendants of fair comment, when no malice is shown against that defendant. We have been referred to the authority of Bankes, J., as he then was; the case of *Smith* v. *Streatfeild* (1) which appears on the face of it to indicate that the malice of a writer who is not a defendant may defeat a privilege claimed by printers. But, as I say, I do not find it necessary finally to decide that point now, or the extent to which the doctrine ought to be applied. It is a matter of very great importance indeed to publishers and to printers to know how far malice of a writer is to be imputed to them. It is said that in the case of *Thomas* v. *Bradbury, Agnew & Co., Ltd.* (2) there are indications which support the view of Bankes, J., in the case of *Smith* v. *Streatfeild* (1). There is older authority, on the other hand, which may raise difficulties: *Robertson* v. *Wylde* (3).

I think, however, that this appeal should be allowed for a somewhat narrower reason. Assuming that it be the law that the malice of a joint tortfeasor is material in upsetting the privilege of the defendant, yet this particular interrogatory is, in my opinion, drafted in such a way as to put upon the defendants interrogated a burden which the law does not require them to sustain. The interrogatory in substance asks the defendants not only what information they had as to the knowledge of the writer at the time of publication, which I think they are entitled to ask, but goes further and asks what information Plunkett the author had when he wrote the words complained of which induced the said Plunkett to believe that the expressions of opinion contained in the words and which were alleged to be fair comment made in good faith and without malice, were true.

It seems to me, then, that—except in the case of servants or agents, whose knowledge when they are acting on behalf of the business of their principal, as was stated in the case of *Bolckow* v. *Fisher* (4), by Brett, L.J., as he then was, may be a knowledge of the principal—it is not right, and there is no authority, for asking a person interrogated to make further enquiries as to information which may have been received by the author since the date of publication, or as to information which the author had before or at the date of publication, which, in fact, he had never communicated to the defendants, the publishers, or the printers. It is interesting to observe that Brett, L.J., as he then was, in *Bolckow* v. *Fisher* (4) at p. 169, after saying that a party is not excused from

answering by saying that he was not present but his servants or agents were, if those acts were such as in the ordinary course of business would be done by or be known by his servants or agents, goes on thus :

"I think, however, that he would not be bound to answer as to that which was only known to his servants or agents accidentally and not in the ordinary course of business."

I think that the law is correctly stated by Mr. Gatley in the second edition of his book on LIBEL AND SLANDER IN A CIVIL ACTION, on page 601, thus :

"The party interrogated is not bound to procure information for the purpose of answering from others who are not his agents or servants nor acting as such."

Mr. Gatley cites for that statement an authority which I have not had the advantage of considering : *McMeckan* v. *Aitken* (5). But I think that, quite apart from that authority, that is generally speaking a correct statement of the law.

I think, therefore, that this interrogatory must be disallowed, but I think that Mr. Leon has made it clear that he is entitled to ask what information these defendants have as to the knowledge of Francis Plunkett when they respectively printed and published the libel complained of. That much and no more, I think, is his due. I have not myself prepared any exact form of interrogatory which I consider he might maintain, but I suggest for the first interrogatory something on these lines :

"(1) What information had you when in the case of the second defendants you printed and/or caused to be printed and in the case of the first defendants you published and/or caused to be published, *including information as to the knowledge of Francis Plunkett when he wrote* the words complained of by the plaintiff in this action, which induced you to believe that the expressions of opinion or any and which of them in the said words contained and which you allege in paragraph 6 of the defence herein are fair comment made in good faith and without malice were true ?"

There would be, therefore, a consequential omission in paragraph (2) and paragraph (3) of the references to Plunkett.

SCOTT, L.J. : I agree. I think the question of principle, as to whether the sentence in the judgment of BANKES, J., in *Smith* v. *Streatfeild* (1) at page 769 is correct, is a question of quite first-class importance in these days when so much matter is published which may be libellous. The sentence is : "In my opinion it follows from this rule of law that in the case of a joint publication of a libel each tortfeasor is liable for the malice of the other." The reason why it is not necessary to decide whether that is right or not is this. Assuming it to be right, assuming that the state of mind of the writer is, therefore, a relevant fact, I still think that an interrogatory to printers and publishers as to

what the state of mind of the writer was, simply, in that form, would be an oppressive interrogatory. I think it ought to be limited to the information on that topic possessed by the printers and published at the relevant mome··; namely, the moment of publication, which is a joint act by the printers, publishers, and author. Since we take the view that to allow an interrogatory in the wider form would be wrong, and we allow it only in that limited form, it is not necessary for us to come to a final conclusion on the question of principle as to whether the sentence of Bankes, L.J., is correctly stated or not.

Applying that decision of the Court to the interrogatories which have been administered or allowed by the Judge and Master, I agree with my brother Slesser, L.J., in his comments upon the form of words there appearing, but I do not think this Court should take the burden of re-drafting interrogatories, and I therefore suggest that counsel for the respondent should redraft his interrogatories so as to limit them to interrogatories asking for information as to the state of Plunkett's mind in the possession of the defendants at the moment of publication. That will mean the deletion of certain parts of interrogatory number (1), as indicated by my learned brother; of the words relating to Francis Plunkett. (His Lordship detailed the consequential deletions, and continued:) Instead of the words deleted, in the interrogatories must be inserted, either in the body of each of the three interrogatories or by way of a separate interrogatory, questions covering the same ground but limited to the information on the topics in question possessed by the defendants at the moment of publication. I suggest that he should do that now, and then see if he cannot agree with counsel for the appellants on those interrogatories, and let the Court see what is agreed. Counsel for the appellants, at the request of the Court, undertook not to raise, by way of objection to answering, the question, which was open for discussion here, as to whether the principle of the sentence of Bankes, J., is right or wrong.

Appeal allowed, subject to the amendments outlined in the judgments.

Solicitors: *W. H. Court & Son* (for the appellants); *Rubenstein Nash & Co.* (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

EGGINTON *v.* READER.

[KING'S BENCH DIVISION (Lewis, J.), **January 23, 27, 1936.**]

Negligence—Personal injuries—Servant or independent contractor.

The driver of a motor-car negligently knocked down and injured a pedestrian. The driver was the owner of the car, but he used it to carry samples of the goods of B. & A. G. Ltd., which he received each morning and returned or accounted for each evening. In order to sell such goods he visited such places and persons as he thought fit without being subject to any direction by B. & A. G. Ltd., and he was not prohibited from acting as agent or servant of any other person or company, and, indeed, was at liberty to refuse to call on any person B. & A. G. Ltd. might suggest. He was remunerated by a commission on sales and was paid £1 per week towards the cost of his petrol. It was not, however, a term of the agreement between the driver and B. & A. G. Ltd., that he should use the said or any car. There was no binding agreement upon the driver to work at all, but upon his failure to procure orders, B. & A. G. Ltd. would have terminated the payment for petrol.

HELD : in the circumstances the driver was not the employee or agent of B. & A. G. Ltd., and the plaintiff was not entitled to recover damages for negligence against B. & A. G. Ltd.

Criteria as to whether a person is an employee or an independent contractor stated by MCCARDIE, J., in *Performing Right Society Ltd.* v. *Mitchell & Booker (Palais de Danse) Ltd.* [1924] 1 K.B. 762 at pp. 766-769 adopted.

[**EDITORIAL NOTE.** The question in this case is quite a narrow one, and is simply this : Whether upon the proper legal construction of the terms of the agreement between the driver and the company, the driver was an employee of this company or an independent contractor. Generally speaking this is a question of the control of the principal over the inferior party, and it seems quite plain that in the present case the latter was left with a perfectly free hand. The only point of difficulty was a contribution made by the company to the cost of petrol used by the car. Apart from the case of *Performing Right Society Ltd.* v. *Mitchell & Booker (Palais de Danse), Ltd.* [1924] 1 K.B. 762 ; DIGEST SUPP. Copyright, No. 489 (*b*), the case may very usefully be compared with *Hobbs* v. *Royal Arsenal Co-operative Society, Ltd.* (1930) 23 B.W.C.C. 254 ; DIGEST SUPP. Master and Servant, No. 2216 (*a*), where the decision went the other way.

AS TO THE DEFENCE OF INDEPENDENT CONTRACT IN AN ACTION FOR NEGLIGENCE, see HALSBURY, 1st Edn., Vol. 21, pp. 471-475, and FOR CASES THEREON, see DIGEST, Vol. 36, pp. 98-100].

Cases referred to :

(1) *Jones* v. *Liverpool Corporation* (1885) 14 Q.B.D. 890 ; 34 Digest 24, *34*.

(2) *Laugher* v. *Pointer* (1826) 5 B. & C. 547 ; 34 Digest 23, *27*.

(3) *Donovan* v. *Laing, Wharton & Down Construction Syndicate, Ltd.* [1893] 1 Q.B. 629 ; 34 Digest 26, *49*.

(4) *Performing Right Society* v. *Mitchell & Booker (Palais de Danse), Ltd.* [1924] 1 K.B. 762 ; 34 Digest 29, *72*.

ACTION for damages for personal injuries caused by negligence. The facts and a full account of the pleadings and proceedings in the case are fully stated in the judgment.

The following is a short statement of the history of the proceedings. The action was brought by a wife and her husband for personal injuries

to the wife, the husband being joined for the purpose of claiming certain medical expenses and was originally brought only against the driver of the motor car which caused the injuries. The driver was insured against third party risks, but at an early stage of the case the insurance company concerned failed. The plaintiffs doubting the ability of the driver to pay any damages which might be recovered in the action then brought in as defendants the company for whom the driver was a salesman on commission, pleading that the company were liable for the negligence of their agent. The main question in the case was whether the terms of the agreement between the company and its salesman or agent, which are fully stated in the judgment, made him in law the agent of the company or an independent contractor.

Anthony Marlowe for the plaintiffs.

The defendant Reader appeared in person.

The defendants B. & A. Gowns Ltd. did not appear at the trial, but entered an appearance, filed a defence, and answered interrogatories.

Lewis, J.: In this case the plaintiffs are a Mr. and Mrs. Egginton, husband and wife, and the defendants are Leslie Alfred Reader and B. & A. Gowns Ltd. On Oct. 12, 1934, the female plaintiff, Mrs. Egginton, who is now 62 years of age, met with an accident in Stroud Green Road. She was knocked down by a car driven by the first defendant, Leslie Alfred Reader, who was also the owner of the car. The car was standing stationary close to the kerb in Stroud Green Road, on the south side, and the female plaintiff, seeing the car standing stationary and no other traffic moving in the road, attempted to cross the road, when the defendant Reader, without any warning to the plaintiff, backed his car and knocked her down, and she received somewhat serious injuries.

The writ was issued on Oct. 24, 1934, some twelve days after the accident. The statement of claim was delivered on Nov. 10, 1934. The writ was issued against Leslie Alfred Reader as the sole defendant, and the statement of claim, which was delivered, as I have said, on Nov. 10, 1934, was a statement of claim claiming damages only as against Reader. Reader delivered his defence on Nov. 22, 1934, and in that defence Reader said he was not guilty of any negligence, and pleaded contributory negligence on the part of the female plaintiff. Shortly after that it was discovered that the insurance company who had insured the defendant Reader against third party risks was insolvent. I know no more about it than that I was told that the insurance company had failed; whereupon the plaintiffs amended their writ and their statement of claim and added as second defendants B. & A. Gowns Ltd. They amended their statement of claim by alleging that the first defendant, Reader, was the servant or agent of the second defendants, or alternatively that the motor car which belonged to the first defendant

had been hired by the second defendants from the first defendant, and was driven by the first defendant, that is to say, the servant or agent of the second defendants. There was a third alternative plea that the motor car was owned jointly by both Reader and the second defendants. The second defendants entered appearance, and they filed a defence in which they denied negligence, they pleaded contributory negligence, and they further stated that the defendant Reader was not their servant or agent. The second defendants did not appear at the trial. The first defendant, Leslie Alfred Reader, appeared in person.

I may say at the outset that one of the most important questions I have to decide, of course, is whether or not the female plaintiff, who suffered the injuries to which I have referred, suffered them by reason of the negligence of Reader. Of that I have no doubt at all. Reader, who was called by the plaintiffs, admitted that before backing his car he looked round through the little window at the back—it was a saloon car—and saw a man with a barrow coming along who was overtaking him. He waited until the man with the barrow had passed him, and then, without looking round again and without giving any warning whatever, he backed his car, and as a result the female plaintiff was knocked down and injured. I am satisfied that the injuries to the female plaintiff were caused by the negligence of the defendant Reader, and that entitles the plaintiffs to judgment against the defendant Reader for the amount which I will mention in a moment.

But the second question in the case, and one which is far more difficult, is as to whether or not the defendants B. & A. Gowns Ltd. who, as I have said, were added as defendants at a late stage, are also liable. It, of course, is clear that Reader's was the hand that caused the damage, but they sought to say that the defendants B. & A. Gowns Ltd. were in such a position vis-a-vis Reader as to make the well-known principle of *respondeat superior* apply. The plaintiffs have to satisfy me that Reader, when he was guilty of the negligence, was acting as the servant of B. & A. Gowns Ltd. so as to make them liable for his acts.

Now, the facts as to the relationship between Reader and B. & A. Gowns Ltd. are that Reader was working on commission to sell the products of B. & A. Gowns Ltd. He was paid a commission of 6 per cent. on all sales effected by him, and, as he had a car of his own, he was given an allowance of £1 per week for the upkeep of that car. At the time of the accident he had with him samples of B. & A. Gowns Ltd. and he was calling at a house where he hoped to find someone from whom he could obtain an order and so get commission. The terms on which he was employed are set out in the answers to interrogatories sworn by B. & A. Gowns Ltd., which answers were put in by the plaintiffs' counsel, and they are as follows. The defendants B. & A. Gowns Ltd.

were asked: "Was not the defendant Reader at the time of the matters complained of in the statement of claim employed by the defendant company in some and what capacity? If yea, what were the terms of the said employment? Were they in writing or were they verbal? If in writing, identify the document or documents. If verbal, state the substance of the said terms." The second interrogatory was: "Was it not part of the duties of the said Reader to travel from place to place on behalf of the defendant company? If yea, was it not a term of the said employment that the said Reader should drive his motor car for the said travelling? And was he not engaged in so doing at the time of the collision complained of?"

The answers by B. & A. Gowns Ltd. to those two interrogatories were as follows: "At the date of the matters complained of in the statement of claim the defendant Reader was acting as an agent for the sale of the goods of the defendant company, B. & A. Gowns Ltd. He was entrusted each morning with samples of stock, which he had to return or account for at the end of each day, and he called on his customers during the day with a view to booking orders for the goods of his said co-defendants. The said defendant Reader visited such places as he thought fit in his search for orders as aforesaid, and was not subject to any orders or directions from the defendant company either as to the districts or the persons firms or companies he should visit, neither was he prohibited from acting as agent for or seeking orders for goods of other persons, firms or companies. The said defendant Reader received as remuneration from the defendant company a commission of 6 per centum on the value of the goods of the defendant company sold by him, and in addition he was paid £1 per week towards the cost of his petrol. The agreement under which the defendant Reader acted as aforesaid was made orally on Oct. 8, 1934." The second answer was: "It was part of the duties of the said defendant Reader to travel to such places as he thought fit to sell goods on behalf of the defendant company. It was known at the time that the agreement of Oct. 8, 1934, was made that the defendant Reader owned a motor car and proposed to use it in his travels, but it was not a term of the said agreement that the said defendant should use the said or any motor car. The defendant company do not know whether the defendant Reader was engaged in travelling on their behalf at the time of the collision complained of."

That account of the terms upon which Reader (to use a neutral expression) was employed was corroborated by the witness Reader in the witness-box. It was supplemented by him, because he stated that not only was he at liberty to call on anyone he liked, but that he was at liberty to refuse to call on any person that B. & A. Gowns Ltd. might tell him to call upon; in fact, he was his own master, and could work when, how, or where he liked, and that B. & A. Gowns Ltd.

had no control over him in the manner in which he obtained orders. Indeed, if he so wished he need not work at all, though if he had not done so he would have effected no sales, and B. & A. Gowns Ltd. would immediately have terminated any arrangement as to the upkeep of his car. In those circumstances, was he the agent or servant of B. & A. Gowns Ltd. ?

This is not a case of deciding whose servant he was, which is the problem which has been presented very frequently to the courts, and is to be found in a great many reported cases. I refer in passing to such cases as *Jones* v. *Liverpool Corporation* (1); *Laugher* v. *Pointer* (2); and *Donovan* v. *Laing, Wharton and Down Construction Syndicate, Limited* (3). Those were decisions as to whether a person was the servant of "A" or the servant of "B," and except in so far as they lay down general principles of the tests to be employed, they are not on all fours with the present case. The question, to my mind, in this case is whether or not Reader was the servant or agent of B. & A. Gowns Ltd. at all, or at least to such an extent as to make B. & A. Gowns Ltd. responsible for his negligent acts. I have come to the conclusion that he was not. The tests of deciding whether a person is a servant or not are set out in a judgment of the late MCCARDIE, J., in the case of *Performing Right Society, Ltd.* v. *Mitchell and Booker (Palais de Danse), Ltd.* (4), to which case I was referred by Mr. Marlowe for the plaintiff. I do not propose to read anything like the whole of that judgment, but at page 766 the learned Judge said this: "It seems convenient, ere examining the agreement with the band"—in that case the band were the persons whom it was sought to show were the servants or agents of the defendants—"to consider the tests to be applied in deciding whether a man be a servant or an independent contractor. Those words have been discussed in many cases." Then the learned Judge for three and a half pages goes through the various authorities, and I respectfully adopt, as part of my judgment, those pages from page 766 to the middle of page 769. The learned Judge in that case then proceeded to summarise the particular agreement in that case under which the band worked. Then on page 771 he sums up the position, and on that page he says: "Such is the agreement which was signed by each member of the band. In my humble opinion it is an agreement which made the band the servants of the defendants. It provides for seven hours' daily service. It uses the word 'services.' It mentions 'salary.' It mentions 'pay.' It uses the word 'employ.' It provides for a period of employment. It provides that the band shall play at any place in London where the defendants may direct. It provides that their services shall be at the exclusive disposal of the defendants. It gives the defendants the right of immediate dismissal for the breach of any reasonable instructions or requirements. Above

all, it gives, I think, to the defendants the right of continuous dominant, and detailed control on every point, including the nature of the music to be played. In my opinion this is not a case of an independent contractor agreement with some features of a service agreement; it is a case rather of a service agreement with several peculiar features appropriate to the employment of a band."

Now, in my view, the case before me is the direct converse of that. Taking those tests which the learned Judge at page 771 applied to the particular agreement before him, I cannot find that a single one of those tests is satisfied in this particular case. Indeed, none of those elements which were present in that case seems to be present in this. I therefore find (and I do so with some regret, in view of the fact that I understand a judgment against the first defendant will not be worth very much) that B. & A. Gowns Ltd. were not the employers of the defendant Reader in such a sense as to entitle the plaintiffs to recover from them damages in respect of the negligence of Reader. I think there must be judgment against Reader for £400 for the female plaintiff and £140 (which is to include, of course, the hospital charges) in favour of the male plaintiff against the defendant Reader, and I give judgment accordingly; but I think there must be judgment for the defendants B. & A. Gowns Ltd. against the plaintiffs.

Judgment for the plaintiffs against the defendant Reader with costs and judgment for the defendants B. & A. Gowns Ltd. against the plaintiffs without costs.

Solicitors: *Raymonds*, (for the plaintiff).

[*Reported by* W. J. Williams, Esq., *Barrister-at-Law.*]

BRITISH AND FRENCH TRUST CORPORATION *v.* THE NEW BRUNSWICK RAILWAY COMPANY.

[KING'S BENCH DIVISION (Hilbery, J.), **December 18, 19, 1935, and January 16, 1936.**]

Money—Covenant to pay on a gold basis—Redemption of debenture—Payment of interest—Construction—Surrounding circumstances.

Estoppel—By record—Judgment in default of defence—Judgment upon one of a series of like debentures—Identity of debentures not pleaded in previous action.

(i) The defendants issued on Aug. 1, 1884, 6,000 First Mortgage Gold Bonds of like amount, tenor and date. The bonds were secured by a mortgage trust deed and all became due on Aug. 1, 1934. The bonds stated that on that date the defendants for value received promised "to pay to the bearer or registered holder thereof £100 sterling gold coin of Great Britain of the present standard of weight and fineness at its agency in London, England, with interest thereon" at 5 per cent. per annum payable in London or at the holder's option at the defendant's office in New Brunswick. The interest coupon stated that the company would pay the bearer £2 10*s.* sterling at its agency in London, England, or at its office in New Brunswick on Aug. 1, 1934. The plaintiffs, a holder of 992 such bonds, claimed in respect of each bond the sum in sterling calculated on Aug. 1, 1934, then representing the gold value of £100 on Aug. 1, 1884.

HELD: the plaintiffs were not entitled to be paid on such gold basis, but only £100 sterling; because upon the true construction of the bond, and the question was purely one of construction, the contract was not one for a payment of gold *in specie*, but one for the repayment of £100 sterling. The interest was similarly payable in sterling.

(ii) In an action between the same parties upon one of the said bonds the plaintiffs obtained judgment on Nov. 7, 1934, upon the gold basis now claimed, the present defendants not having put in any defence to that action. The statement of claim in that action did not allege that all the bonds were identical in their terms.

HELD: there was no estoppel by record, because each bond was a distinct contract and, further, the record of the previous action did not show that all the bonds were in the same terms.

Feist v. *Societe Intercommunale Belge D'Electricite* [1934] A.C. 161 distinguished.

[**EDITORIAL NOTE.** The terms used in this case are American rather than English, and in England the bonds herein referred to would be called first debentures secured by a trust deed. It then becomes obvious that the contract was in effect one of mortgage or of a secured loan. The present case is distinguished from that of *Feist* v. *Societe Intercommunale Belge D'Electricite* (*supra*) in two ways: (*a*) In the earlier case the bond was given when there was a probability of England going off the gold standard, but there was no such probability in 1884. (*b*) There is a considerable difference in the actual terms of the two bonds, in particular, that in the earlier case provided for the payment of interest in similar terms to those used in reference to the principal sum. It is understood that the case will probably be brought before a higher Court.

The estoppel point seems to lack the support of any authority precisely in point, though the law seems to have been generally accepted on the lines here laid down. The matter is fully discussed in HALSBURY, 2nd Edn., Vol. 13, p. 445, note (*r*). The Irish case of *Irish Land Commission* v. *Ryan* [1900] 2 I.R. 565, 21 DIGEST

146, case (*s*), seems to go further than the decision here, but, if it does, it has not been generally accepted.

As to Redemption of Securities, see DIGEST, Vol. 35, p. 176, Nos. 60-63, and Supp. Money pp. 9, 10.]

Cases referred to :

(1) *Feist* v. *Societe Intercommunale Belge D'Electricite* [1934] A.C. 161 ; Digest Supp.

(2) *Petition of Right of International Trustees for the Protection of Bondholders Aktiengesellschaft* (1935) 154 L.T. 56 ; Digest Supp.

(3) *Seddon* v. *Tutop* (1796) 6 Term Rep. 607 ; 21 Digest 211, *505*.

(4) *Brunsden* v. *Humphrey* (1884) 14 Q.B.D. 147 ; 21 Digest 207, *480*.

(5) *Kitchen* v. *Campbell* (1772) 2 Wm. Bl. 827 ; 21 Digest 208, *489*.

Action for (i) a declaration that the bonds in question and the interest thereon were payable on a gold basis, (ii) payment of aggregate amount due on that footing, (iii) damages for breach of the contracts made by the said bonds. The third claim was alternative to the other two.

The pleadings and the arguments fully appear from the judgment.

H. A. H. Christie, K.C., and *H. S. G. Buckmaster* for the plaintiffs.

Gavin T. Simonds, K.C., and *Valentine Holmes* for the defendants.

Hilbery, J. : The plaintiffs are the holders of 992 First Mortgage Gold Bonds issued by the defendants, a corporation, duly organised and existing under the laws of the Province of New Brunswick and the Dominion of Canada, under their corporate seal on Aug. 1, 1884. These bonds are part ot a series of six thousand bonds of like amount, tenor and date, all issued by the defendants to secure a borrowing by the defendants of £600,000 sterling. All the bonds issued to secure the repayment of this £600,000 sterling were equally secured by a First Mortgage Deed of Trust of even date with the bonds executed by the defendants. This Deed of Trust is expressly referred to in each bond. All the bonds became due for repayment on Aug. 1, 1934. The plaintiffs bought the bonds, which are the subject of this action, on Aug. 15, 1934, at £95.

Each of the bonds is in the following terms : " Dominion of Canada. Province of New Brunswick. £100 sterling. First Mortgage Gold Bond. Issued by the New Brunswick Railway Company. A Corporation duly organised and existing under the Laws of the Province of New Brunswick and Dominion of Canada." There the heading of the bond stops. Then the bond continues : " The New Brunswick Railway Company for value received hereby promises to pay to the bearer or registered holder hereof on the first day of August, one thousand nineteen hundred and thirty four the sum of one hundred pounds sterling gold coin of Great Britain of the present standard of weight and fineness at its agency in the City of London, England, with interest thereon at the rate of five pounds sterling per centum per annum payable semi-annually on the first days of February and August in each year in the said City of London or at the option of the holder at the office of the company in New Brunswick

on presentation and surrender of the interest warrants or coupons hereto annexed as they severally become due. This bond is one of a series of six thousand bonds, of like amount, tenor and date, numbered from one to six thousand inclusive and amounting in the aggregate to six hundred thousand sterling, all equally secured by a first mortgage or deed of trust of even date herewith, executed by the said company to the Central Trust Company of New York as trustee, covering the entire railway of the said company and all its lands and territory, rolling stock, equipment, rights, franchises, easements, privileges and appurtenances. The holder of this bond will also be entitled equally with the holder of each of the other bonds of said issue to the benefit to be derived from a sinking fund to be appropriated, derived and set apart from the sale of the lands of the said railway company for the redemption of said issue of bonds, at the times and in the manner in said mortgage or deed of trust specified. This bond shall pass by delivery, unless registered in the name of the owner on the books of the company in New Brunswick or wherever else the company may keep transfer books. After a registration of ownership, certified hereon by the transfer agent or officer of the company, no transfer, except on the books of the company, shall be valid unless the last preceding transfer shall have been to bearer, which shall restore transferability by delivery; but this bond shall continue subject to successive registrations and transfers to bearer, as aforesaid, at the option of each holder. This bond shall not become valid or obligatory until authorised by a certificate endorsed thereon, signed by the said trustee or its successor in the trust. In witness whereof," etc., and it is countersigned by the secretary the first day of August, 1884. At the conclusion of the bond and forming a part of it is the final coupon for interest. The coupon is in the following terms: "Coupon. £2. 10*s*. 0*d*. sterling. No. 100. The New Brunswick Railway Company will pay the bearer two pounds ten shillings sterling at its agency in the City of London, England, or at its office in New Brunswick, on the first day of August, 1934, being six months' interest on its First Mortgage Bond No. 1251." That number is the number of the particular bond the terms of which I have read.

On March 15, 1935, the plaintiffs presented these bonds at the defendants' agency in the City of London for payment, demanding such sum as represented the price in London in sterling calculated as on Aug. 1, 1934, of 12327.477 grains of gold of the standard of fineness specified in the first schedule to the Coinage Act, 1870, and, by way of the half-yearly interest due on Aug. 1, 1934, a sum equal to two and a half per cent. of that amount, less income tax. As an alternative, the plaintiffs demanded payment of £99,200 with the half-yearly interest thereon in current gold coin of Great Britain.

The defendants refused to make either of these payments, but offered

and tendered payment of £100 sterling for each bond, together with interest, less income tax, at the rate of five per cent. per annum in sterling.

The plaintiffs now bring their action, claiming: "(1) A declaration that upon the true construction of the said bonds, the plaintiffs are entitled as the holders thereof respectively to receive from the defendants in respect of each such bond (*a*) by way of the principal due thereunder on the 1st day of August, 1934, such a sum as represents the price in London in sterling (calculated as on that day) of 12327.477 grains of gold of the standard of fineness specified in the First Schedule to the Coinage Act, 1870, and (*b*) by way of the half-yearly interest due thereunder on the said 1st day of August, 1934, a sum equal to two and a half per cent. of the amount specified in (*a*) above, less income tax. (2) Payment of the aggregate amount due to the plaintiffs in respect of all the said bonds both for principal and interest on the footing of the above declaration with interest. (3) Alternatively to (1) and (2), damages for breach of the defendants' contracts contained in each of the said bonds to pay to the plaintiffs, as holders thereof, on the said 1st day of August, 1934, in respect of each such bond the sum of £100 sterling gold coin of Great Britain of the standard of weight and fineness existing on the 1st day of August, 1884, together with half-yearly interest thereon at the rate of £5 sterling per cent. per annum."

The defendants contend that they are entitled to discharge their obligations under the bonds, as they offered to do, by payment of £100 sterling for each bond and interest at the rate of five per cent. calculated in sterling. The defendants refer to and rely upon the Coinage Act, 1870, the Currency and Banknotes Act, 1914, the Gold Standard Act, 1925, the Currency and Banknotes Act, 1928, and the Gold Standard (Amendment) Act, 1931.

The resolution of these differences between the parties depends primarily upon what is the true construction to be put upon the express terms of the bond defining the rights of the parties.

In the first place, I think it reasonably clear that the contract contained in the bond is one for repayment in money of a loan. It is not a contract for delivery of bullion. It is expressed to be and is a promise to pay on a particular day the sum of £100. If the contract is one for the payment of a debt, as I think it is, and not for the delivery of gold *in specie*, the plaintiffs cannot maintain their alternative claim for damages for non-delivery of the gold coins if the defendants have offered and tendered that which is legal tender for the payment of the indebtedness created by the bond. The question that must be resolved on the construction of the bond is primarily whether the plaintiffs are right when they say that the words of the bond, whereby the defendants undertake to pay £100 sterling gold coin of Great Britain of the standard of weight and

fineness which was the standard on Aug. 1, 1884, amount to the measure of what they are to be paid or whether, as the defendants say, they indicate the mode in which the payment is to be made.

Now it is a canon of construction that the words of a contract must, if possible, be given their natural meaning. The function of the Court is to find and to give effect to the intention of the parties in accordance with the language which the parties have selected. If, from the surrounding circumstances in which the contract is made or through other things which are expressed in the contract itself, the words of a particular clause cannot be given their natural and ordinary meaning, the Court will give them a meaning consonant with the other expressions in the contract and with the circumstances surrounding the making of the contract.

In this case no evidence was put before me of any surrounding circumstances in which the contract was made. In the contract itself the only place in which what has been called the gold clause appears is, significantly enough, in the repayment clause: "The New Brunswick Railway Company for value hereby promises to pay to the bearer or registered holder hereof on the 1st day of August, 1934, the sum of £100 sterling gold coin of Great Britain of the present standard of weight and fineness." Nowhere else in the bond do the words about gold coin appear. The bond is doubly headed "One Hundred Pounds Sterling." True it is also headed "First Mortgage Gold Bond," but in the same sentence as that in which payment of £100 sterling gold coin is mentioned, the bond goes on to specify that payment is to be made "with interest thereon at the rate of five per cent. sterling per annum payable semi-annually on the first days of February and August of each year." Furthermore in the second paragraph the bond is stated to be one of a series of six thousand bonds of like amount, tenor and date, amounting in the aggregate to £600,000 sterling and the coupon for the last half-yearly payment of interest due on the date when the bond falls due for repayment is expressed to be a coupon for £2. 10*s*. 0*d*. sterling and that expression is used where the money sum is stated in figures as well as where it is expressed in words in the body of the coupon.

The whole of the bond appears to me to be impressed with the character of a bond for repayment of £100 sterling. The very use of the words "promises to pay the sum of £100 sterling gold coin" in a bond where everything else is expressed to be payable in sterling and appearing as they do only in connection with the promise to pay indicates, I think the mode of payment which the defendants undertake to make and which the holder of the bond is entitled to receive. The mere fact that it is called "First Mortgage Gold Bond" does not seem to me inconsistent with this view. That title is appropriate to a bond which promises that gold coin shall be the mode of payment of the £100 sterling which the bond secures.

It was pressed upon me on behalf of the plaintiffs that the construction of this clause was concluded in their favour by reason of the decision in *Feist* v. *Societe Intercommunale Belge D'Electricite* (1), to which I will refer hereafter as the *Feist* case. On examination that case appears to me, however, rather to support my view of the true construction of the bonds before me than to establish the contention of the plaintiffs. In the *Feist* case their Lordships' House gave the gold clause in the bond the meaning and effect for which the holder of the bond contended and for which the plaintiffs in the suit before me now contend, but it is to be observed that Lord Russell states that to give that construction strained the words of the document and fitted awkwardly with some of its provisions, but he preferred it to the only other alternatives, namely, attributing no meaning at all to the gold clause or attributing to it a meaning which from other parts of the document and the surrounding circumstances, the parties could not have intended it to bear. Lord Russell approached the question of construction first by consideration of the state of affairs existing at the date of the bond. He said at page 170: "I consider first the state of affairs existing at the date of the bond. The Gold Standard Act, 1925, had exempted the Bank of England from obligation to pay its own notes in legal coin but had provided that such notes should not thereby cease to be legal tender. Further, it had repealed the provision of the Currency and Bank Notes Act, 1914, entitling the holder of a currency note to be paid its face value in gold coin. It had, however, provided that the Bank of England should be bound to sell on demand gold bullion at the price and as therein specified to any person on demand, but only in the form of bars containing approximately 400 ounces troy of fine gold. The Currency and Bank Notes Act, 1928, had received the Royal Assent, though it did not come into operation until Nov. 22, 1928. By that Act, the Bank of England was authorised to issue bank notes for £1 and for 10*s*., which were to be legal tender for any amount. Existing currency notes were converted into bank notes, the Bank becoming liable upon them; and the Bank was empowered to require any person in the United Kingdom owning gold coin or bullion to an amount exceeding £10,000 in value to sell it to the Bank on payment (in the case of gold coin) of the nominal value thereof. The country was on the gold standard, but the notes were inconvertible and gold coin was substantially no longer in circulation. These being the circumstances and conditions of the time, it is not, I think, improper or hazardous to make two surmises: (1) that the gold clause was inserted in clauses 1 and 2 of the bond in contemplation of the contingency of this country going (as it did in 1931) off the gold standard at some future date; and (2) that neither party to the bond can have contemplated payment under the bond being actually made in gold coins." I pause to observe that in the case before me, as I have

already said, there was no evidence of the surrounding circumstances in which the bond was issued. The date was 1884—and this at least is certain, that in 1884 those special matters which LORD RUSSELL found in the circumstances surrounding the issue of the bond in the *Feist* case were not the circumstances in which the bond now before me was issued. On the contrary, either party to a bond for £100 issued in 1884 might have contemplated and probably did contemplate a payment being made, if demanded, by £100 in gold sovereigns.

The other consideration which LORD RUSSELL indicates as forcing him to the construction which he adopted was this. At page 171 he said: "I turn to the bond to see if from the contents of the document itself it is apparent that the parties did not use the words of the gold clause in accordance with the literal meaning which they would bear if considered apart from the rest of the document and the circumstances which surrounded its execution."

In the bond in the *Feist* case the words "in sterling in gold coin of the United Kingdom of or equal to a standard of fineness existing on September 1st, 1928," not only appeared in the repayment clause, but were attached to the clause providing for a payment of interest at the rate of 5½ per cent. per annum and LORD RUSSELL pointed out that in those circumstances the words must mean something other than what they said, for translating the 5½ per cent. by equal half-yearly payments into the appropriate figures the provision became a provision for the payment of £2. 15*s*. 0*d*. in gold coin of the United Kingdom. He pointed out that the same consideration applied to the interest coupons—and again he pointed out that the bond which he was considering was expressed to be one of an authorised issue of bonds to a principal amount not exceeding £500,000 in sterling in gold coin of the United Kingdom at any one time outstanding, and that the words used in that clause could not bear their literal meaning. For. said Lord Russell, "there is no issue or amount outstanding in gold coin of the United Kingdom." After pointing out these matters Lord Russell goes on to say: "I therefore ask myself this question. If the words of the gold clause cannot have been used by the parties in the sense which they literally bear, ought I to ignore them altogether and attribute no meaning to them, or ought I, if I can discover it from the document, to attribute some other meaning to them? Clearly the latter course should be adopted if possible, for the parties must have inserted these special words for some special purpose, and if that purpose can be discerned by legitimate means, effect should be given to it." A little further on LORD RUSSELL said: "I am conscious, my Lords, that this construction strains the words of the document, and that it fits awkwardly with some of its provisions."

Every one of the considerations which led to what LORD RUSSELL called

a construction which strained the words given to the bond in the *Feist* case is absent from the case before me. If their presence alone led to the construction which was put upon the clause in the *Feist* case, their absence in the present case would at least seem to leave no reason for doing violence to the natural and ordinary meaning of the contractual words. I can find no reason in the present case for not giving the words in the bond before me their literal and ordinary meaning.

I cannot help observing that a view similar to mine has been taken by Branson, J., in the case of *The Petition of Right of International Trustee for the Protection of Bondholders Aktiengesellschaft* (2), though that case is, I realise, distinguishable from this that I have to decide.

That being the construction which I place upon the contract, it was not contended by the plaintiffs that the defendants in tendering sterling have not discharged their indebtedness under the bond, unless the bond was to be considered as one for a payment of gold *in specie*; and that contention I have already rejected.

Although, of course, it cannot affect the question of construction which I have had to determine, it is interesting to observe that the decision of the House of Lords in the *Feist* case was given and published on Dec. 15, 1933, and was reported and discussed in the public press. If that decision governed the construction or gave effect to what business men understood to be the meaning of the bonds now before me, then it was plain to all that the holder of any one of these bonds was entitled to receive £183. 3*s*. 5*d*. sterling on Aug. 1, 1934. Yet the plaintiffs were able to buy the bonds at £95 on Aug. 15, 1934.

The other point which has to be decided—and I was asked in any event to give my decision upon each of the points—is the matter raised in the reply in this case, where the plaintiffs assert that: "By a judgment dated the 7th November, 1934, and made in the King's Bench Division of the High Court of Justice in an action wherein the plaintiffs were plaintiffs and the defendants were defendants, the short title whereof and reference whereto is 'The British and French Trust Corporation, Ltd., *v.* The New Brunswick Railway Company 1934 B.3150' the plaintiffs recovered judgment against the defendants upon the basis claimed in this present action in respect of bond No. 3300 (being one of the bonds comprised in the series of 6,000 bonds referred to in the statement of claim herein and in all respects identical with such other bonds except as regards the denoting number thereof). (2) The defendants did not enter any defence to the said action and, in the circumstances, the plaintiffs will contend that the defendants are estopped from raising in this action any of the matters or contentions set forth in paragraphs 5 and 6 of their defence and/or from setting up any defence to this action."

This is in terms a plea of estoppel by record. Where that is the plea,

the record itself must establish the estoppel. The parties being the same, as GROSE, J., says in *Seddon* v. *Tutop* (3), the question is not whether the sum demanded might have been recovered in the former action; the only enquiry is whether the same cause of action has been litigated and considered in the former action. Bowen, L.J., in *Brunsden* v. *Humphrey* (4) said: "The difficulty in each instance arises from the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit?" The Lord Justice quotes and supplies the words of DE GREY, C.J., in *Kitchen* v. *Campbell* (5), where that Chief Justice said: "The principal consideration is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case."

Applying this test, BOWEN, L.J., decided, as also did BRETT, M.R., that damage to goods and injury to the person, both occasioned by one and the same wrongful act, are infringements of different rights and give rise to distinct causes of action, and therefore the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently begun for the injury to the person.

In my view, each of these bearer bonds for £100 sterling issued by the defendants is to its holder, in the event of non-payment of the £100 upon the due date, a distinct and separate cause of action to recover £100. Each is a separate contract to pay the bearer of that particular bond the sum of £100, and therefore breach of that contract gives a distinct cause of action to each bearer.

The record here pleaded in estoppel does not show that the judgment obtained by the plaintiffs, dated Nov. 7, was upon the same contractual instrument as any one of the instruments claimed upon in this action. It was a judgment upon the cause of action arising out of non-payment of the particular bond there sued on. It is not a judgment upon the same cause of action as any of the causes of action now being litigated before me. Indeed, the face of the record shows that judgment was given upon a contract which was a different one from any of those 992 distinct contracts in the form of bonds the numbers of which are given in this action.

Furthermore, on a reference to the statement of claim in the former action referred to in the judgment and forming part of the record, it will be found that, while the bond there in suit was alleged to be one of a series of 6,000 of like amount, there is no statement that it and all the other bonds were of the same tenor.

The record of itself does not therefore even establish that the bonds there adjudicated upon and the bonds in the present action are in the same terms.

In my view, the plea of estoppel is not therefore established.

Junior counsel for the plaintiffs supported the plea with the argument that the borrowing by this issue of bonds by the defendants of £600,000 created one contract only between the defendants and a class; that each bond was only a copy of the contract for an individual member of the class, and that, by failing to put in a defence in the former action, the defendants admitted that the bond was one in respect of which the defendants were liable to pay that measure which the plaintiffs now demand.

The reasons which I have already given for holding that the estoppel is not made out contain the answer to this argument. I think it clear that each bond issued was a separate contract. If 6,000 different people had each lent £100 towards the original borrowing and received a bond, I am quite unable to follow how it can be said that there was not a separate contract with each in respect of his loan reduced into written terms in each bond.

In those circumstances, there must be judgment for the defendants, with costs.

Solicitors: *Allen & Overy* (for the plaintiffs); *Linklaters & Paines* (for the defendants).

[*Reported by* H. Parrish, Esq., *Barrister-at-Law.*]

REX *v.* FREDERICK ROBERTS.

[COURT OF CRIMINAL APPEAL (Talbot, Macnaghten and du Parcq, JJ.), **January 27, 1936.**]

Criminal Law—Evidence—Prisoners charged on same indictment with different offences—Evidence by one accused against the other—Cross-examination of first accused on previous conviction—Admissibility—Criminal Evidence Act, 1898 (*c.* 36) *s.* 1 (*f*) (*iii*).

Appellant was charged and convicted at Quarter Sessions under the Larceny Act, 1916, s. 20 (1) (iv) (*a*), with fraudulently converting certain property entrusted to him. On the same indictment another prisoner, M., was charged under sect. 32 (1) of the same Act with causing by false pretences money to be paid to the appellant. The appellant stated in evidence against M. that M. had signed certain documents in his presence. Counsel for M. then cross-examined the appellant as to a previous conviction of his.

HELD: as the appellant and M. were not charged with the same offence, it was not open to M.'s counsel by virtue of Criminal Evidence Act, 1898, s. 1 (*f*) (iii) to question the appellant on his previous convictions, and the conviction must be quashed.

[**EDITORIAL NOTE.** Apart from the dictum of LORD ALVERSTONE, C.J., in *R.* v. *Hadwen* [1902] 1 K.B. 882; 14 DIGEST 450, *4756*, there is little apart from the actual words in the statute to aid one in the construction of the particular proviso governing this case. This case decides as might well be supposed in the case of a criminal statute that the words "same offence" must receive their usual strict construction, and it is not sufficient that the prisoners are charged in relation to the same criminal transaction. They must be charged with the same technical offence.

AS TO THE CRIMINAL EVIDENCE ACT, 1898, s. 1, see HALSBURY, 2nd Edn., Vol. 9, pp. 216, 217, para. 303, and for the statute itself, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 8, p. 248. FOR CASES UPON THE PROVISO, see DIGEST, Vol. 14, pp. 449, 450, Nos. 4755, 4756, and p. 444, No. 4697.]

APPEAL from a conviction at the County of London Quarter Sessions, on December 12, 1934, for fraudulent conversion of property, under Larceny Act, 1916 (c. 50), s. 20 (1) (iv.) (*a*).

John Maude, for the Commissioner of Police, stated that the Crown recognised that the admission of the question was fatal to the conviction and did not oppose the appeal.

Douglas Potter, for the appellant, was not called upon.

TALBOT, J. (delivering the judgment of the Court): In this case there were two men who, whether properly or not, I do not express an opinion, but at any rate probably within the law, were charged on one indictment. The appellant Roberts was charged with fraudulently converting certain property entrusted to him by a lady named Beatrice Anne Steel, in order that he might apply the same for the payment of a quarter's rent of a house which, I presume, was taken by her. That is an offence against the Larceny Act, 1916, s. 20 (1) (iv) (*a*). The other man, John Moore, was indicted under another section of the same Act, s. 32 (1), for causing by false pretences money to be paid by Beatrice Anne Steel to Frederick Roberts; and also with another offence against the same subsection

and concerning the same parties, but in respect of a different sum of money. The false pretence was the same in both cases.

This point arises because, during the course of the trial, Roberts was cross-examined by the counsel appearing for Moore as to a previous conviction of Roberts. Roberts had provoked that question (if I may use the expression) by stating, whether truly or not it is unnecessary to say, that Moore had signed certain documents in Roberts's presence, which Moore denied. In fact, Moore implied, if he did not actually state, that Roberts had forged the signature. That question was asked after due preparation of Roberts for something coming. It was in fact mentioned by the learned Deputy Chairman in his summing-up to the jury, and it never seems to have struck anybody at the time that there was any difficulty about it.

Now Roberts appeals against the conviction on the ground that it was altogether improper ; that there is no right to cross-examine a man under his trial as to a previous conviction except in certain limited cases defined by the Criminal Evidence Act, 1898. That Act made general what had already been done in certain particular cases ; it put persons indicted for crimes on the footing of ordinary witnesses ; that is to say, it allowed them to give evidence on their own behalf. The Act, as one can easily understand from the state of feeling about that great change which prevailed at the time, gave prisoners a good deal of protection. That is to say, they were not for all purposes on the footing of ordinary witnesses ; they were allowed to give evidence, but they were protected, very naturally, against anything being said about any previous conviction. That, of course, harmonises with and follows one of the most cardinal principles of the criminal law : that a man is to be tried on the question whether it is sufficiently proved that he did the crime with which he is charged, and that it cannot be suggested to the jury, directly or indirectly, that he was likely to have committed it because he had previously done something of the same kind. There may be other reasons, but they are probably obvious.

To the rule that, generally speaking, a prisoner cannot be cross-examined as to a previous conviction, there are certain exceptions, and it is upon one of those exceptions that the question in this case arises. Sect. 1 of the Criminal Evidence Act, 1898, which makes a person charged with an offence, and the wife or husband of such a person, a competent witness for the defence, has a considerable number of provisos, and one of them is as follows :

> "(*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless——"

Then there are three exceptions, and the third of them is the one on which this question arises :

> " (iii) he has given evidence against any other person charged with the same offence."

That must be strictly construed. One could easily conceive arguments for making that provision more extensive ; that is to say, for allowing a further exception to the exemption of persons from this particular line of cross-examination. One must, however, obviously take the statute as it is, and that at once brings us face to face with the question whether it can be said that the offence or offences with which Moore was charged in this case are the same offence as that with which Roberts was charged.

I have already read, so far as is necessary, the description of the offences with which these two men were respectively charged in the same indictment, and it is quite clear that it would be impossible to say that they are the same offence. Learned counsel for the Crown has very properly recognised that as a fatal bar to the correctness of this conviction. The conviction must therefore be quashed and the appellant discharged.

Solicitors : *The Solicitor's Department, Metropolitan Police Office ; The Registrar of the Court of Criminal Appeal* (for the appellant).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister at-Law.*]

RAILWAY ASSESSMENT AUTHORITY *v.* SOUTHERN RAILWAY COMPANY.

LONDON COUNTY COUNCIL *v.* SOUTHERN RAILWAY COMPANY.

[House of Lords (Lord Hailsham, C., Lord Thankerton, Lord Russell of Killowen, Lord Maugham, Lord Roche), **November 18, 19, 21, 22, 25, 26, 28, 29, 1935, and January 24, 1936.**]

Rating—Railway hereditament—Principles of assessment—"Fair and just division of the net receipts as between landlord and tenant"—Railways (Valuation for Rating) Act, 1930 (*c.* 24) *s.* 4.

(i) The Railways (Valuation for Rating) Act, 1930, s. 4, has not put an end to the system of assessing the hypothetical rent by deducting from the net receipts a percentage of the amount of the capital required by the tenant for the working of the undertaking, and allowing the balance only as rent, though there may be circumstances in which it is inapplicable.

(ii) There are three elements in assessing the percentage to be allowed on the tenant's capital, (*a*) the interest on capital, (*b*) profit on the adventure, (*c*) fair return on his capital having regard to the risks which he undertook.

(iii) The alteration in the economic position of railways since 1921 by virtue of legislation then and subsequently passed is not a relevant fact to affect the construction of the language of the Railways (Valuation for Rating) Act, 1930, though it may be relevant in estimating the rent at which the railway premises would let as a whole.

(iv) In the case of a railway within the Railways (Valuation for Rating) Act, 1930, the hypothetical landlord is not entitled to a higher rent in respect of the large capital expended in creating the immovable parts of the undertaking.

(v) The "fair and just division" in Railways (Valuation for Rating) Act, 1930, s. 4, is not an aliquot division on an unspecified basis, but involves the ascertainment of the landlord's share in the form of rent.

(vi) The landlord must be contemplated as a possible tenant, and the difficulties of finding a tenant must not influence the valuation.

(vii) The Railway Assessment Authority are not limited by Railways (Valuation for Rating) Act, 1930, s. 4 (1) (*a*) to considering only the actual results for the years 1928 and 1929, but may take into account the tendencies shown by the results of years preceding or following those years.

(viii) The tenant is not a mere investor to be compensated by the ordinary rate of interest on his investment. The rate must be such as to afford a profit commensurate with the risk involved and to induce him to embark on the undertaking. The actual figure is a question of fact for the Railway Assessment Authority.

[EDITORIAL NOTE.—The rating of railway property has always been a difficult problem in practice, but the principles of valuation were quite well settled before the Act of 1930. This case is concerned with the construction of the 1930 Act and more particularly with sect. 4 thereof, and the main question debated is how far the old principles of valuation of railway property has been superseded or are still applicable under the new Act. Under the new Act a Railway Assessment Authority is set up which has to determine the net annual value of the undertaking of the railway company as a whole and then apportion such value.

As to the Rating of Railways, see HALSBURY, 1st Edn., Vol. 24, pp. 30-35, paras. 50-58, and for the Cases see DIGEST, Vol. 38, pp. 534-546.

For the Railways (Valuation for Rating) Act, 1930, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 455.]

Cases referred to :

(1) *R.* v. *The Great Western Railway Co.* (1852) 15 Q.B. 379, 1085 ; 38 Digest 535, *803.*

(2) *R.* v. *The West Middlesex Waterworks* (1859) 1 E. & E. 716 ; 38 Digest 450, *171.*

(3) *R.* v. *London, Brighton & South Coast Railway* (1851) 15 Q.B. 313 ; 38 Digest 518, *695.*

(4) *London, Midland & Scottish Railway* v. *Assessor of Railways and Lands, Scotland* [1933] S.C. 590, Digest Supp.

(5) *Kingston Union* v. *Metropolitan Water Board* [1926] A.C. 331 ; 38 Digest 547 *901.*

(6) *Mersey Docks and Harbour Board* v. *The Birkenhead Assessment Committee* [1901] A. C. 175 ; 38 Digest 526, *735.*

(7) *R.* v. *London School Board* (1886) 17 Q.B.D. 738 ; 38 Digest 522, *713.*

(8) *London County Council* v. *Erith Churchwardens and Dartford Union Assessment Committee* [1893] A.C. 562 ; 38 Digest 429, *42.*

(9) *R.* v. *South Staffordshire Waterworks Co.* (1885) 16 Q.B.D. 359 ; 38 Digest 551, *920.*

Appeals direct from an order of the Railway and Canal Commission Court on questions of law by virtue of Railway and Canal Traffic Act, 1888 (as amended) and Railways (Valuation for Rating) Act, 1930, s. 9 (4).

The first appeal was by the Railway Assessment Authority and the second by the London County Council, the County Valuation Committee of Middlesex, the Corporation of Croydon, and the Corporation of Brighton.

The Railway Assessment Authority had assessed the net annual value of the undertaking of the Southern Railway at £2,180,000. The Southern Railway Company thereupon appealed to the Railway and Canal Commissioners, contending that the correct valuation was £500,000, and the local authorities claimed that the value determined by the Railway Assessment Authority should be increased to £3,000,000. The Railway and Canal Commissioners found the correct valuation to be £1,077,131 and directed the Railway Assessment Authority to substitute that sum for the figure of £2,180,000 above referred to. Thereupon these appeals were brought.

The arguments are fully referred to in the judgment.

Sir William Jowitt, K.C., Sir Stafford Cripps, K.C., and *Erskine Simes* for the Railway Assessment Authority.

D. N. Pritt, K.C., Sydney Turner, K.C., and *Michael Rowe* for the London County Council, the County Valuation Committee of Middlesex, the Corporation of Croydon and the Corporation of Brighton.

Tyldesley Jones, K.C., Walter Monckton, K.C., Trustram Eve, K.C., and *Alfred Tylor* for the Southern Railway Company.

The Lord Chancellor : My Lords, there are before you two appeals, one by the Railway Assessment Authority and the other by certain local authorities, from an order of the Court of the Railway and Canal Commission, dated Feb. 6, 1935, allowing an appeal by the Southern Railway Company from the determination and certificate of the appellants, the Railway Assessment Authority, determining the net annual value of the undertaking of the respondent company as a whole for rating purposes to be the sum of £2,180,000. The Commissioners, allowing the appeal of the respondent company, directed the appellants to substitute for that sum the sum of £1,077,131 as the net annual value of the undertaking of the Railway Company for rating purposes. There is an appeal direct to this House by the joint effect of the Railway and Canal Traffic Act, 1888 (as amended), and the Railways (Valuation for Rating), Act, 1930, s. 9 (4), but only on questions of law, the decision of the Commissioners on questions of fact being final. The Railway Assessment Authority not being interested parties, appeared before your Lordships mainly for the purpose of obtaining directions from this House which would guide them in the performances of their difficult and important duties under the Act of 1930. The London County Council and other local authorities were, of course, interested in supporting the decision of the Railway Assessment Authority, or at least obtaining a decision which might enable them to secure from the Commissioners the fixing of a higher figure than £1,077,131. The interested appellants did not present arguments precisely on the same lines as those put forward by the Railway Assessment Authority ; but your Lordships have had the advantage of hearing a full and able discussion of the problems arising in connection with the rating of railways under the Act of 1930, so far as questions of law are concerned, and have been enabled to arrive at their opinions on them.

Although the actual points for decision turn mainly, if not entirely, upon the construction to be placed on certain sections of the Railways (Valuation for Rating) Act, 1930, all parties were agreed that in order to reach a proper conclusion on the questions at issue, it was essential to bear in mind the law with regard to the rating of railways as it stood at the date of the passing of the Act. Accordingly, before turning to the language of the Act, I propose to state shortly what I apprehend to be the legal position as it then was.

The foundation of our rating law is the Poor Relief Act of 1601, which imposed liability on the inhabitants and occupiers of every parish to contribute to the relief of the poor in that parish. It was early established that the contributions were to be levied according to the value of holdings in the parish ; and, after some diversity of practice, Parliament enacted that the liability should rest only on the occupiers of rateable hereditaments and not on inhabitants in respect of their person-

alty. In 1836 the Parochial Assessment Act of that year provided by sect. 1 that the rate was to be based :

> " upon an estimate of the net annual value of the several hereditaments rated thereunto. That is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent-charge, if any, and deducting thereform the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent."

Substantially the same language is used in the Parochial Assessment Act, 1862, and in the Valuation of Property Metropolis Act, 1869, with regard to London. My Lords, this method of assessing liability for rates was no doubt very suitable for the simple conditions which prevailed in the reign of Queen Elizabeth ; but when it was sought to apply it to modern conditions, and especially to the assessment of great public utility undertakings, such as railways, waterworks, gasworks, and the like, whose operations might easily extend over great areas, stretching far beyond the limits of any individual parish, the greatest difficulty was found in adapting the statutory provisions to the facts of such a case. The Courts, more than once, appealed to the legislature to relieve them from the burden thus cast upon them ; see, for example, the judgment of LORD CAMPBELL in *R.* v. *The Great Western Railway Company* (1), at pages 396 and 397, and the judgment of WIGHTMAN, J., in *R.* v. *The West Middlesex Waterworks* (2), at page 728. Unfortunately the legislature did not see its way to intervene and the Courts were compelled to evolve a system of calculation, with the assistance of the expert advisers to the rating authorities and to the undertakings, which involved a number of very difficult assumptions, but which received the approval of your Lordships' House on a number of occasions, and which became recognised as the standard method of assessing the rateable value of hereditaments in these cases. So far as the railways were concerned, the method adopted was to divide the undertaking into those portions which were regarded as directly productive of profit, such as the permanent way, and those portions which were regarded as only indirectly productive of profits, such as stations and other hereditaments of that kind. The latter were usually valued by taking the cost of erection and allowing a percentage upon that cost, on the theory that the companies would not have erected them unless they had regarded them as worth at least a fair average rate of interest upon the money invested in their construction. This method was commonly described as the " contractor's basis." So far as the directly productive portions of the undertaking were concerned, it is obvious that, if the permanent way was treated as an isolated entity without continuation at either end of the parish, its rateable value would be practically nothing ; on the other hand, if it were regarded as a vital link between lines existing up to the borders of

the parish, its value would be very great indeed. The former method would have been plainly unjust to the rating authorities; the latter would have been equally unjust to the companies. The method of assessment of the rateable value which was in fact adopted was the method which was commonly described as the "profits basis."

In order to apply the profits basis, the calculation commenced by ascertaining the gross receipts earned in the parish for the latest period prior to the date of the rate. It was held improper to take the total gross receipts of the whole system and to allocate them to the parish, according to mileage—*R.* v. *London, Brighton & South Coast Railway* (3). From the gross receipts earned in the parish, a proper proportion of the working expenses throughout the system had to be deducted, and a deduction had further to be made for the portion allocated to the parish of rent hypothetically paid for the use of stations and other indirectly productive assets, and for the rates payable in respect thereof. The amount remaining after making these deductions from the gross receipts earned in the parish was taken as the net profit divisible between the owner and the hypothetical tenant. Since the hypothetical tenant was only rateable in respect of hereditaments which he was supposed to occupy, it was necessary to make a fair deduction for the use of his personalty and stock-in-trade; the method adopted was to estimate the amount of capital required to work the whole system, to calculate a fair proportion of this amount as being fairly allocated to the particular parish and to allow the deduction of a certain percentage on the capital so ascertained from the amount of the divisible net profit. The percentage to be allowed on this capital was fixed at a sum considered to be sufficient to give the tenant interest upon his money and a fair return on his capital for the risks which he undertook and by way of profit on his adventure. The portion of the net profits which remained after his deduction was regarded as the rent which the hypothetical tenant would be prepared to pay, deducting, of course, the statutory allowances thereon, in order to arrive at the true rateable value.

It is not known who first applied this system, but it certainly was in common use by the middle of last century, and it was the system invariably adopted from that time until the outbreak of the Great War. When the War broke out, the Government took over the control of all the railway systems in the country, and since there was no allocation of the receipts between the different railways, it was impossible to continue to apply this method.

Accordingly, during the period of the War, the rates were adjusted by arrangement between rating authorities and the railway companies by agreement and not fixed on any precise basis. After the termination of the War, there was passed the Railways Act, 1921, which received the Royal Assent on Aug. 9 in that year. By that Act, the principal

railway companies in England and Scotland were amalgamated into four large units, of which the respondent company is one. The Act set up a Railway Rates Tribunal, which was charged with the duty of fixing the railway charges to be exacted by the different companies. The charges were to be assessed on such a basis as would, in the opinion of the Tribunal, ensure to each of the companies, with efficient and economical working and management, an annual net revenue equivalent to the net revenue of their constituent companies in the year 1913, together with proper allowances in respect of additional capital since invested. And the old system under which the railways were allowed to fix their charges, provided that they did not exceed certain maximum rates and did not give an undue preference to individual traders, was abolished.

In 1925 the Rating and Valuation Act of that year was passed, in order to simplify and amend the law with regard to the making of rates generally. That statute, by sect. 22 (1) (*b*), defined the net annual value for rating purposes to be the rent at which the hereditaments might reasonably be expected to let from year to year, if the tenant undertook to pay all usual tenant's rates and taxes and tithe rent-charge, if any, and to bear the cost of repairs and insurance and other expenses, if any, necessary to maintain the hereditament in a state to command that rent.

In 1928 the Rating and Valuation Apportionment Act of that year was passed, which defined what it described as "freight-transport hereditaments" as including, *inter alia*, hereditaments occupied and used wholly or partly for railway transport purposes as part of a railway undertaking carried on by such a company as the respondent company; and the Local Government Act, 1929, by sect. 86, reduced the rateable value of freight-transport hereditaments to one-quarter of the net annual value thereof and went on to make provisions, in the eleventh schedule, for the creation of a fund into which the rate relief so afforded should be paid by each railway company and should be administered substantially in the reduction of charges on certain selected traffics.

From this very brief summary, it will be seen that, after the War, a number of important changes had been made affecting the economic position of railway companies. I have thought it right to give such a brief summary of the nature of those changes, since it was argued by the appellants that the existence of these Acts of Parliament and their effect were relevant in order properly to construe the provisions of the Railways (Valuation for Rating) Act, 1930. There is no doubt that the changes to which I have called attention do affect or tend to affect the average net receipts of any railway company, both by reducing competition and by altering the basis of charges and by giving certam relief in respect of rates, which has to be applied for the benefit of the

selected traffics ; in that sense they are certainly relevant circumstances which the Railway Assessment Authority must take into account in estimating the rent at which the railway hereditaments might reasonably be expected to let as a whole ; but I am unable to appreciate why the existence of these Acts should be relevant to affect the construction of the language used in the Act of 1930. In my opinion, the Court was right in disregarding them for that purpose.

It is to the consideration of the language of that Act of Parliament that I now turn. The Railways (Valuation for Rating) Act, 1930, began by providing in sect. 1 that the provisions of the Rating and Valuation Acts relating to the ascertainment of the values of hereditaments should cease to apply in the case of railway hereditaments in England occupied by a railway company to which the Act applies, which admittedly includes the respondent company ; and it enacted that the values for rating purposes of all such hereditaments should be the values thereof as ascertained in accordance with the provisions of the Act.

I pause here to say that there are other provisions to be found in the Act relating to railways whose undertakings are carried on partly in Scotland, but we are here concerned with a company the whole of whose railway undertaking is in England. Your Lordships' attention was called to a judgment of the Court of Session on the construction of this statute as it applied to Scotland, and it was stated that there was no material difference between the provisions with regard to Scotland and those relating to England. I do not desire to pronounce finally on the correctness of that decision. It is sufficient to say that the language of the sections is not identical and that the rating system and practice of the two countries, before the passing of the statute, was very different. No doubt the effect of your Lordships' judgment in this case upon the views expressed in *London, Midland and Scottish Railway* v. *Assessor of Railway and Lands, Scotland* (4), will be fully considered in any case which comes up for decision hereafter in Scotland. It is not necessary or desirable to attempt to determine that question to-day.

Under sect. 2, the Railway Assessment Authority is constituted ; by sect. 3, provision is made for the preparation of a railway valuation roll to come into force on the appointed day and provision is further made for quinquennial revisions of the valuation roll. By sect. 3 (3), the Railway Assessment Authority is required to determine the net annual value of the undertaking of a railway company as a whole, to apportion the net annual value so determined among all the railway hereditaments in England occupied by that railway company, and to calculate the rateable value of every such hereditament by reference to the net annual value so apportioned to it. Sect. 4 contains the provisions in accordance with which the net annual value is to be ascertained—and it is on the

language of this section that the main controversy turns in the present case.

By that section the Railway Assessment Authority is required to ascertain in the first instance the average net receipts of the company for the accounting years 1928 and 1929; that figure has been ascertained in the present case at £5,408,000, and no dispute arises with regard to it. By sect. 4 (1) (*b*) the Railway Assessment Authority shall then

> "estimate by reference to the average net receipts ascertained as aforesaid the rent at which the railway hereditaments occupied by the company might reasonably be expected to let as a whole from year to year, if the tenant undertook to pay all usual tenant's rates and taxes and tithe rentcharge (if any) and to bear the cost of the repairs and insurance and other expenses (if any) necessary to maintain the hereditaments in a state to command that rent";

and the subsection goes on to provide:

> "The annual rent so estimated shall, for the purposes of this Act, be deemed to be the net annual value of the company's undertaking as a whole."

Pausing there for a moment, your Lordships will not fail to notice the identity of the language used in this subsection with what had been the law ever since the Parochial Assessment Act of 1836, and what has been the basis applicable to railway rating for the last hundred years; and indeed it was not seriously disputed by the appellants that, if that subsection had stood alone, the construction placed upon the Act by the Railway and Canal Commission could not have been impeached. The only substantial difference from the old system is the provision that the annual value of the whole undertaking shall be ascertained as a whole and shall then be apportioned between the different parishes, instead of attempting to ascertain the earning capacity of each part of the railway line lying within a particular parish, as was done in pre-war days. The new method also does away with the necessity of drawing a distinction between directly and indirectly productive parts of the undertaking and calculating the rateable value of the indirectly productive parts of the undertaking in each parish upon the "contractor's basis." But what has to be ascertained still remains the rent at which the hereditaments might reasonably be expected to let from year to year on the terms set out in the Act.

But the subsection which I have quoted is followed immediately by subsect. (2), and it is on the language of that subsection that the appellants mainly rely. I think, therefore, that it is useful to quote its exact language. Sect. 4 (2) provides that:—

> "In estimating for the purposes of this section the rent at which the railway hereditaments occupied by a company might reasonably be expected to let as a whole, the Railway Assessment Authority and any court before which any determination of the Authority is under appeal shall not be bound to give effect to any custom or practice affecting the valuation of railway heredita-

ments which obtained prior to the passing of this Act in regard to the deduction or allowance to be made in respect of the capital of a tenant, but shall have regard to all relevant circumstances and all material considerations with a view to securing that such estimated rent shall represent a fair and just division of the net receipts as between landlord and tenant."

Basing themselves on these words and particularly on the direction that the estimated rent is to "represent a fair and just division of the net receipts," the appellants contend that the Act has put an end to the old system of calculating the amount of the capital required by a tenant for the working of the undertaking and allowing him a percentage thereon, and that it is now necessary to follow some other method. In particular it is urged that the hypothetical landlord is entitled, having regard to the large amount of capital which has been expended by him in creating the railway company's undertaking, to some proportion of the net receipts obtained either by comparison of the landlord's capital and of the tenant's capital, or by allowing the rent at which the railway hereditaments might reasonably be expected to let as a whole from year to year to be influenced and presumably increased by a consideration of the large amount of capital expended in creating the immovable parts of the undertaking.

I can see no ground for any such conclusion. In the first place, it may be observed that the second part of the subsection beginning with the words "but shall have regard" seems naturally to indicate that there is an antithesis between the considerations to which the Authority is not bound to give effect, and the new rule that all relevant circumstances and material considerations with a view to securing that the estimated rent represents a fair and just division of the net receipts as between landlord and tenant shall be borne in mind.

What, however, is more important is the circumstance that the only custom or practice which the Authority is declared to be at liberty to depart from is a custom or practice "in regard to the deduction or allowance to be made in respect of the capital of a tenant." It is thus beyond question that the legislature contemplates that there will be a deduction or allowance in respect of the tenant's capital, and having regard to the universal practice which obtained before the Act came into force of making such a deduction or allowance in the shape of a percentage upon the tenant's capital, it is in my opinion clear that the section in no way directs the Authority to depart from this method and to adopt some other method which is left wholly undefined. It is not in dispute that it is essential in some way to exclude the profits earned by the hypothetical tenant's rolling stock, plant, and other implements, and your Lordships were not informed of any clear and satisfactory method of doing this, except by means of a percentage on the capital employed in providing such chattels. The appellants laid

especial stress on the concluding words of the subsection. They contend that the reference to a fair and just division of the net receipts shows that the old method of ascertaining the rent which the tenant is prepared to pay, must be abandoned, since that basis of calculation provides for the tenant receiving his share of the net receipts before the landlord gets anything, and might, in some cases, involve the landlord getting nothing ; and they point out that the conception of a division of the net receipts is inconsistent with the ordinary relationship of landlord and tenant.

My Lords, I am quite unable to accept this argument. It is true that the expression " division of the net receipts " is not a very happy phrase to describe the deduction from the net receipts of the amount necessary to induce the hypothetical tenant to embark upon the enterprise, but I see no justification in that fact for altering the conception of the relationship of landlord and tenant to a conception of joint adventurers, an alteration which is really involved in the appellants' argument. The explanation of the use of the word " division " is probably to be found in the fact that it was the usual expression in rating law at the date of the Act, and that, if the amount which the tenant would require in order to induce him to take and operate the hereditaments is properly ascertained and deducted from the total net receipts, the result is to divide the net receipts fairly and justly between landlord and tenant, even though, in an extreme case, the landlord's share might be nothing at all. It is the rent which is to be estimated in such a way as to represent a fair and just division, and it is evident that the rent and nothing else is to be the landlord's share. When this is ascertained, the balance is the tenant's share of the net receipts. The " division," therefore, is not to be an aliquot division on some unspecified basis, but is to be the result of a process involving the ascertainment of the landlord's share in the form of rent.

My Lords, I am not prepared to say that there are no circumstances in which the profits basis, as it has been previously applied, would be inappropriate, or that under no circumstances could any other method be adopted. I think that the more accurate way of stating the position is to say, as LORD CAVE said in the *Kingston Union Case* (5), that this method is the recognised one and is one which the Authority is justified in adopting as it has done in the present case ; that it would need special circumstances to require the adoption of a different method and no such circumstances are to be found in the present case ; and that the only alternatives put forward by the appellants are, in my judgment, plainly inadmissible. It follows that on the main point of construction I am of opinion that the decision reached by the Railway and Canal Commission Court was correct, and I invite your Lordships to adopt that conclusion.

But in addition to this main point of construction, certain subsidiary questions were raised by the appellants in the course of argument, and it is desirable that this House should express an authoritative opinion upon them. In doing so, it is necessary to bear in mind the language of Lord Halsbury in the *Mersey Docks and Harbour Board* v. *The Birkenhead Assessment Committee* (6) at page 180. The then Lord Chancellor there points out (at pages 179 and 180) that the legislature has imposed upon the Authority the obligation of solving a simple question of fact, that is to say, to form an estimate of the net annual value, and he goes on to say that they are to arrive at that value unfettered by any statute as to the way in which they can do it. "I am not aware of any rule or law or any statute which has limited them as to the mode in which they shall arrive at it. It is not a question of law at all: it is a question of fact. These questions have from time to time come before the Courts, and have been argued as questions of law, but that is where, instead of doing what the statute has directed them to do, the overseers have thought proper either to include something which by law ought not to be included, or to exclude something which ought to have been included." I apprehend that it is only if we are satisfied that the Authority has gone wrong in one of these two ways that there is any power in your Lordships' House to interfere.

My Lords, it was also contended that even if the old and well-established profits basis was the correct method to apply, it could be shown from the judgments under appeal that the Commissioners had misapplied the method, having regard to the positive terms of sect. 4 (2) of the Act. There is, of course, no doubt that the Railway Assessment Authority is free to disregard old customs and practices in regard to the deduction or allowance in respect of the capital of the tenant. Two illustrations are afforded by the judgments of the Commissioners, first, the old practice in regard to the valuation of the rolling stock, and secondly, the old practice of adding to the cost of manufacture of rolling stock by a company in its own workshops a percentage supposed to represent the manufacturer's profit. These two points were decided against the Railway Company for the reasons clearly expressed in the judgment of MacKinnon, J., and I need not add anything on these points. It is, however, asserted that the Commissioners, in fixing the hypothetical rent, misdirected themselves upon several other points. They determined in the result that the amount of the tenant's capital was £27,610,690 and that 15 per cent. was a fair and proper percentage for interest, trading profit and risks. This amounted to £4,141,603. To this was added £189,266 as the tenant's share of receipts earned without the use of the tenant's rolling stock, making a total of £4,330,869. Deducting this sum from the average net receipts (£5,408,000) the amount of £1,077,131 is reached as the net annual value of the company's

undertaking as a whole. The enormous effect of a slight alteration in the percentage allowed is evident, for 1 per cent. on £27,610,690 is £276,106, and it was strongly urged that 15 per cent. on the tenant's capital was a percentage only arrived at by wrong views as to the principles on which the hypothetical rent is to be ascertained in the case of a railway, regard being had to the provisions of sect. 4 of the Act of 1930.

My Lords, I am not satisfied that these contentions were made out; but there are certain phrases in the judgments of the Commissioners which might be open to misconstruction, and having regard to the great importance of this case and others which may depend upon it, it is, perhaps, desirable to state as clearly as the case admits the principles upon which the hypothetical rent and the percentage on tenant's capital which form so important an element in fixing it ought to be ascertained.

The definition requires an estimate of the sum which a hypothetical tenant might be expected to pay to a hypothetical landlord. It was well settled before the Act that it was necessary in estimating such a rent to take into account the owner of the hereditaments as a possible tenant (*R.* v. *London School Board* (7), *London County Council* v. *Erith Churchwardens and Dartford Union Assessment Committee* (8)); and, further, that the hypothetical tenant, though only a tenant from year to year, is supposed to have a reasonable prospect of continuing to be a tenant (*R.* v. *South Staffordshire Waterworks Company* (9)). There is no doubt that both these principles, if they may be so described, continue to be true.

A further general observation occurs to me, and that is that one may be led astray in the case of a railway undertaking by attempting too detailed or elaborate a personification of the hypothetical tenant. In the case of an ordinary house a rating authority may well visualise an ordinary citizen with all the usual desires, tastes and avocations of mankind as the tenant who is to pay the rent; but when we come to a railway undertaking in which vast sums have been invested and in which the share of the tenant's capital amounts to many millions, it is apparent that the effort to visualise an actual tenant involves an almost impossible strain. In my opinion it would be a mistake to allow the percentage to be influenced by the largeness of the sum which the tenant is supposed to supply for capital, or by the difficulty of finding a tenant with such extensive means, or by the difficulty the tenant might find either in realising his rolling stock and other chattels or in re-investing so large an amount of capital on the expiration of his tenancy. Since the landlord is to be contemplated as a possible tenant, none of these considerations must be allowed to come in.

It was argued by the interested parties that the Tribunal were precluded from taking into account the actual results of any years and that they were limited to a consideration of the average net receipts as

directed by sect. 4 (1) (*a*). My Lords, I cannot accept that view. No doubt the figures upon which the calculation of rent is to be based are those which are ascertained in the terms of that subsection; but I think that the figures of individual years, either forming part of the average, or preceding or following the standard years, are relevant as showing the tendency of the receipts to rise or fall, and therefore as an indication of the risk which the hypothetical tenant would have in mind when he was contemplating renting the premises. To take a convenient illustration which was given in the argument; supposing one company had had net receipts during a quinquennium of one, two, three, four or five million pounds respectively, and another company during the same period had had receipts of five, four, three, two and one million pounds respectively, the average net receipts of each company would be the same, but it seems preposterous to suppose that the hypothetical tenant would give as much rent for the hereditaments in the second case as he would in the first. Another point which was urged was that the Authority had omitted to take into account the landlord's capital, and it was pointed out that considerable sums had been recently spent which were not reflected in the net receipts of the standard years. Again, it was urged that the rates in the standard years were paid at a much higher rate than those which would be payable by virtue of the Authority's decision. I think that these two factors would both be relevant elements to enter into the tenant's consideration when he was contemplating taking the hereditaments, and that their existence would be reflected in the percentage allowed to the tenant on his capital; but I am not satisfied that they have been ignored by the Court below from that point of view. They would rightly be excluded from the question of construction to which I think they are quite irrelevant.

Then it was said that the Court had assumed that the hypothetical tenant might well be left at the end of the year with a huge amount of unrealisable rolling stock and that he would require very heavy compensation to make up for that risk. The respondents expressly disclaimed any such contention and no trace of it was to be found in the arguments below. I think it must be assumed that the hypothetical tenant would be able to realise his stock at the end of the year as easily as he could acquire it at the beginning of the year at the market value prevailing at the respective dates. There is a certain risk of fall in market value, just as there is the possibility of increase in market value, but he must not be given a higher percentage on the basis that he may be unable to sell the stock at all.

Then, again, it was said that the Court below had proceeded on the hypothesis that the hypothetical tenant would have to assemble together from all over the country an adequate staff to manage and run the railway undertaking and that this was wrong in law. The contention

was based upon a passage in the judgment of SIR FRANCIS TAYLOR, where, after citing LORD HERSCHELL'S words in the *Erith* case (8), he goes on to say, "vacant premises seem to me to be inconsistent with the presence of a highly trained staff and management." My Lords, it is this expression which has given me most trouble in the present case. If it were to be construed as bearing the meaning which the appellants allege, if your Lordships were to assume that the Court based their allowance for tenant's capital on the view that the tenant must be treated as somebody who came to take over this great railway system with no means of running it, with no directors or managers or staff, and that he had to be compensated for the risk which he ran of being unable to assemble such an organisation in order to carry on his undertaking, then, indeed, I think the appellants would be right in saying that the calculation has proceeded upon a wrong basis. It must be assumed that there is in existence the present staff and management of the railway and that the tenant can reasonably expect to avail himself of their services.

I cannot believe that that is the true meaning to be placed upon the expression. The passage in the judgment begins by a reference to the contention on behalf of the Assessment Authority that the hypothetical tenant was to be treated as an investor in a very favourable concern with a staff specially provided for him, having to give neither skill nor judgment in the carrying on of the undertaking. I think that the observation of the learned Commissioner was directed to this contention, which is, of course, not well founded. A tenant is not to be regarded merely as an investor in railway shares and to be treated therefore as reasonably compensated by the ordinary rate of interest which can be obtained by such an investment. He is a person embarking upon a commercial undertaking in which he is to sink his capital, in which he takes all the risks of success or failure, and in which he has not merely to be compensated by receiving a reasonable interest upon the capital invested, but also to receive such a profit upon his venture as reasonably to compensate him for the risk which it involves, and to induce him to embark upon its prosecution. How much that percentage ought to be is a question of fact which is for the Authority and not for your Lordships' House.

It was finally contended by the appellants that it could be shown mathematically from the accepted figures in the case that the Tribunal had not given effect to their own decision as to disallowing certain claims for obsolescence and for allowance for mass production. For the respondents this conclusion was vigorously contested. In my judgment, if such a mistake was made, it would be a pure error of calculation and not a question of law for your Lordships' House. By virtue of the Railway and Canal Commission Rules made in 1924, there is power to apply to the Commissioners to review and rescind or vary any decision or order previously made by them. That rule contains a time limit,

but the respondents, while challenging the appellants' contentions upon the merits, agreed that they would not oppose any necessary extension of time. If the appellants think that they can make out that case, their right method is by proceeding under that rule. It is desirable to add that if on proper application the Court is asked to review and vary its decision under the rule above referred to, it is, of course, open to the Court to consider and review its assessment in the light of the decision of your Lordships' House. If upon such review the Court is of opinion in respect of any of the matters arising out of the questions which I have described as subsidiary questions that more weight ought to be given to considerations appearing from this decision than was given to them before such decision, the Court will have the opportunity to deal with the facts in the light of the decision, and, if on the facts it were proper or necessary to do so, to vary the figures fixed by its previous judgment and order.

Your Lordships cannot interfere with the judgment of the Court unless you are satisfied that it did, in fact, proceed upon a wrong construction of the Act, or did either include something which was legally inadmissible, or exclude something to which it was legally bound to have regard. For myself, I am not satisfied that any such error was committed and accordingly I move your Lordships that these appeals be dismissed with costs.

My Lords, I have to add that I have the concurrence of my noble and learned friends Lord Thankerton and Lord Maugham in the opinion which I have delivered.

Lord Russell of Killowen: My Lords, I have had the opportunity of reading and considering the opinion which has just been delivered by the Lord Chancellor. I agree with it and desire to add nothing.

Lord Roche: My Lords, I also have had the opportunity of reading the opinion pronounced by the Lord Chancellor. I concur in the conclusions arrived at by him and announced in that opinion and I have nothing to add.

Appeal dismissed with costs.

Solicitors: *Torr & Co.* (for the first appellants); *Sharpe, Pritchard & Co.* (for the second appellants); *William Bishop* (for the Southern Railway Company).

[*Reported by* S. G. G. Edgar, Esq., *Barrister-at-Law.*]

MANNERS *v.* MANNERS AND FORTESCUE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (DIVISIONAL COURT) (Sir Boyd Merriman, P. and Langton, J.), **January 15, 1936.**]

Husband and wife—Divorce—Petition for dissolution of marriage—Application for re-hearing—Wife respondent not served—Matrimonial Causes Rules, 1924, *r.* 46—*Limits of rule—County Courts Act*, 1888 (*c.* 43) *ss.* 91 *and* 93—*Supreme Court of Judicature Act*, 1890 (*c.* 44) *s.* 1—*Supreme Court of Judicature* (*Consolidation*) *Act*, 1925 (*c.* 49) *s.* 30.

Upon the hearing of an undefended petition for divorce, evidence of service upon the respondent was given and the co-respondent gave evidence of adultery. The wife subsequently stated on affidavit that she had not been served, and had not committed adultery with the co-respondent and applied for a re-hearing of the petition.

HELD: such an application for re-hearing of a cause heard by a judge alone on the ground that there had been no service on the respondent was to be made under Divorce Rule 46 to a Divisional Court of the Probate Divorce and Admiralty Division.

[**EDITORIAL NOTE.**—Courts may have a power to re-hear a case where the re-hearing will not in effect amount to an appeal from their own judgment. The allegation here is not that the Court has made an error, but that it has been deceived by false evidence. Any error made by the Court is a matter for the Court of Appeal, but if no error is alleged then the proper procedure is an application to the Divisional Court in Divorce for a re-hearing.

AS TO THE JURISDICTION, see HALSBURY, 2nd Edn., Vol. 10, p. 779, para. 1233. and for THE CASES THEREON, see DIGEST, Vol. 27, p. 490, Nos. 5220-5233.]

Cases referred to :

(1) *Smith* v. *Smith* [1897] P. 293 ; 27 Digest 490, *5221.*

(2) *Brown* v. *Dean* [1910] A.C. 373 ; 13 Digest 513, *619.*

(3) *Astor* v. *Barrett* [1920] 3 K.B. 633 ; 13 Digest 513, *626*

This was an application on behalf of a wife respondent to a petition for dissolution of marriage for a re-hearing on the ground that she had not been served with the petition. She denied that she had been guilty of adultery.

On June 26, 1935, the husband petitioner was granted a decree *nisi* by the President, the case being undefended.

Kirk Glazebrook, for the wife, reviewed the history of the jurisdiction of the Divorce Court with reference to applications for re-hearing, down to Rule 46 of the Matrimonial Causes Rules, 1924, and submitted that the circumstances of the present case brought it within the scope of Rule 46, which provides as follows :

An application for the rehearing of a cause heard by a judge alone where no error of the Court at the hearing is alleged shall be made to a Divisional Court of the Probate, Divorce and Admiralty Division, and shall be by notice of motion. Application for re-hearing in any case not hereinbefore provided for must be by appeal to the Court of Appeal.

A. McNalty for the husband.

THE PRESIDENT : This is an application under Rule 46 of the Matri-

monial Causes Rules, 1924, for the re-hearing of the divorce cause, *Manners* v. *Manners and Fortescue*, heard by myself alone, and the application is made to this Divisional Court under that rule on the allegation that no error of myself at the hearing is alleged.

As we are informed that this is the first time that this Court has been called upon to give a decision as to the limits of this rule which, as a matter of history, came into existence in 1924 in this form for the first time—and as I, speaking for myself, was the trial judge, I am particularly anxious to make clear that in no circumstances whatever would I contemplate hearing an appeal where my own decision was in any real sense of the word challenged—I think it would be as well that I explained quite shortly what is the exact point of this case.

The husband sued for divorce on the ground of adultery with a co-respondent named Fortescue. In order that the husband may be entitled to have a decree *nisi* of divorce he must prove, first of all, the marriage; secondly that he is a domiciled Englishman, and thirdly, the matrimonial offence alleged—in this case adultery with one Fortescue—and fourthly that he has served the petition upon his wife, and if he asked for any costs from the co-respondent, on the co-respondent also.

So far as the issue of adultery—the first two issues are neither here nor there for the present purposes—is concerned, apart from some evidence of the husband of a confession by the wife and of his having caught the co-respondent at the house at which the wife was living, the actual evidence of adultery before me was provided by the co-respondent himself, who came into the witness-box and swore that he had committed adultery with the wife. There remains, therefore, the question of service. As regards that there were separate affidavits of service, in accordance with the rules of this Court, by two persons who had served respectively the wife and the co-respondent, and though strictly it was unnecessary as the affidavits were self-contained and sufficient, the husband, in fact, gave—it is true in answer to a leading question—evidence before the Court that he had been present on the occasion as the process server had said in each case when the parties respectively were served. And in addition to that, as I have already said, the Court had before it in person the co-respondent with regard to whom one of these affidavits of service related. In those circumstances counsel on both sides, I think not merely out of flattery, say that the fact that the Court accepted evidence of service does not come within the words "error of the Court at the hearing is alleged." But there still remains the question, whether, notwithstanding counsel's admission, this is a case which comes within the rule.

Now I do not want to review the whole history of this matter, which is, I think, reasonably clear, though it takes a certain amount of tracing out. Up to 1890 it is sufficient to say that in this Division, at any rate,

the application for a new trial on an issue of fact tried by a jury, or for the re-hearing of the cause under the old Rule 62, was made to a Divisional Court of this Division. In other words, all appeals came here. Then by the Judicature Act, 1890, s. 1, as interpreted in the case of *Smith* v. *Smith* (1), an application for a new trial to set aside a verdict, finding or judgment, where there had been trial by jury, went to the Court of Appeal, and it was held that the result was that an appeal from a judge alone still went to the Divisional Court of this Division. But in the course of the revision of the statute law in the series of Acts which were passed in 1925, the corresponding provision of the rules of Court—the Matrimonial Causes Rules—was re-cast in the words in which it now stands :

> An application for a re-hearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court of the Probate, Divorce and Admiralty Division

and then the procedure is set out. The result of that I am satisfied is that every other sort of appeal from a judge of this Division in Divorce, whether he is sitting alone, or whether he is sitting with a jury, goes to the Court of Appeal under the rules set out in the White Book applicable to all Divisions of the High Court indiscriminately. This is the only remaining exception from the general jurisdiction of the Court of Appeal in all appeals from a High Court Judge, and therefore it is important, and it is vital, that we should not assume a jurisdiction which properly belongs to the Court of Appeal. The question is whether in the sort of circumstances which I have mentioned, which are the circumstances of this case, where a woman has been condemned of adultery though she says that she has not been served with the petition, that is the kind of thing which comes within these rules or not.

Now there is no precedent to guide us as to what is meant by the words : " Where no error of the court at the hearing is alleged." No such phrasing has ever been used apparently in any other rule of Court applicable to any of the Divisions of the High Court or their predecessors, and even now I think it would be most inadvisable to attempt to lay down any exhaustive definition of what those words mean. On the other hand, I think it is desirable to make it plain why I think that the present case comes well within those words. We suggested yesterday, when we directed the point should be argued, that some assistance, at any rate, could be derived from a consideration of the somewhat analogous provisions relating to County Courts, and our attention has been directed to the relevant sections. I propose to quote the sections of the Act of 1888, because they were the sections in force at the time when this rule was passed, but there is no material difference between them and the corresponding sections of the County Courts Act, 1934. There are two relevant provisions in regard to a County Court Judge's authority

in matters akin to this. Sect. 91 of the Act of 1888 deals with the trial in the absence of the defendant with this proviso :

> "that the judge in such case at the same or any subsequent court, may set aside any judgment or order so given or made in the absence of the defendant, and the execution thereupon and may grant a new trial or hearing, upon such terms, if any, as to payment of costs, giving security or such other terms as he may think just, on sufficient cause shown to him for that purpose."

Now a corresponding provision by R.S.C. Order XXXVI, r. 33, is vested in the King's Bench and Chancery Divisions of the High Court of Justice, and about that sort of thing there can be no doubt, and nobody, I think, would dispute that a case merely of that sort would come well within Rule 46, but the County Court Judge has by the old sect. 93, another power which has no counterpart in the High Court of Justice, except so far as this particular rule of this Division may be said to be to some extent equivalent. A County Court Judge in sect. 93 has powers which are enacted in these words :

> ". . . the judge shall also in every case whatever have the power, if he shall think just, to order a new trial to be heard upon such terms as he shall think reasonable."

Those words are, of course, as wide as well can be, and are obviously very much wider than the words in our Rule 46, but it follows, therefore, that Rule 46, the contents of Rule 46 are something larger than the corresponding sect. 91 of the County Courts Act, and must be considerably less than as provided in sect. 93. I think that some considerable guidance is got from the decisions on sect. 93. I am not going to refer to them at length, but I wish to call attention to two cases. In *Brown* v. *Dean* (2) the House of Lords considered the limits of this very wide section, sect. 93 of the Act of 1888, and after laying down that it was quite plain that this was not an arbitrary discretion, but one which must be exercised conditionally, Lord Loreburn, then Lord Chancellor, expressly agreed with the judgment of Farwell, L.J., in the Court of Appeal in the same case, in which Farwell, L.J., pointed out that the County Court Judge disregarded all the rules which would govern a High Court Judge in similar cases, and said (and Lord Loreburn adopts these words as his own words) ;

> "In the present case the County Court Judge has disregarded those principles, and has granted a new trial on affidavits, which show at the outside that these will be said against oath on a new trial, and that is clearly not enough—which show nothing in the nature of surprise, fraud or conspiracy, and which also state nothing to show that the information alleged could not with reasonable diligence, have been obtained at the first trial. The real ground that influenced the learned Judge appears to have been that he came to his former conclusion of fact with hesitation, and that the matter is serious for the defendant in consequence of his position. Neither of these grounds is in my opinion sufficient."

You will observe that anything in the nature of surprise, fraud or con-

spiracy, anything which could not with reasonable diligence have been obtained at the first trial, and subsequently being discovered, would be regarded whether in the High Court or in the County Court as the sort of case which would plainly come within sect. 93. The only other case to which I wish to refer is one part of which I quoted in argument, and to which Mr. Glazebrook had referred, *Astor* v. *Barrett* (3) at page 641. ATKIN, L.J. (as he then was), in his judgment said, testing the rival contentions as to the limits of sect. 93 :

"The matter must be tested in this way : Suppose there is admissible evidence on both sides and in addition to the admissible evidence the Judge receives evidence which he ought not to have accepted ; if he is afterwards satisfied that he has made this mistake it seems to me he has ample jurisdiction to grant a new trial."

I need not read the rest of the passage, but I take the view that as I have already said that our power under Rule 46 is considerably less wide than that, but at least I think it is wide enough to deal with this case in either of the two aspects in which it is presented to us. We have read the affidavits with regard to the non-service of this petition, and the wife swears categorically that she was never served, although she remembers an incident at a time when she attended a Police Court matter between herself and her husband, a matrimonial matter, when a man came up to her and asked her some questions that obviously corresponds with the occasion on which it is sworn that she was served. It may be one of two things, it may be either that advantage was taken of that occasion to go through the form of identifying her and yet not serving her in order to avoid her appearance, which I say at once I regard as most unlikely, although I am not going to decide one way or the other about it, I think it is so fantastically improper, having regard to the known circumstances of the case, and the fact that the process server was, I gather, the son of the senior partner in the firm of solicitors, that it does not fairly merit consideration beyond stating that it is actually a possibility, or secondly, that as appears from looking at the corresponding evidence of the wife and the fresh evidence of the process server that the wife without knowing that her husband was petitioning against her, because he does not say that he told his wife that he resented a piece of paper being thrust upon her—which she may even have appreciated—was connected with some matter between her husband and herself at the moment when she was about to go into Court on a matrimonial summons, and she dropped it on the floor. That is common ground, or, at any rate, the process server says that it was so, and it was picked up and put into her hands, or put into her coat, as she was actually walking into the Court. In other words, physically she was served, actually the thing she says never came to her notice. I am not going to decide here and now which of these possibilities is actually the truth. All that doubtless will be gone into from one point

of view or another when this case is fully heard out, but it is quite plain that on either view of the facts that this woman is entitled to be heard, seeing that she has stated categorically on affidavit that she has never committed adultery with this man or with anybody else, and in those circumstances the truth of the matter about the form the service took will be investigated, no doubt as a matter of credibility, and witnesses at the next hearing, but that there must be a re-hearing I have no doubt at all. I think that the proper order to be made is for the wife to file her answer within ten days. I think that the co-respondent will have to be re-served, and there must be provision made for expediting the hearing.

Langton, J.: I agree, and since this rule is coming up for consideration so far as I know for the first time, it is perhaps proper that I should add a word or two concerning my interpretation of the rule.

As my Lord has said, there was a valuable analogy to be obtained from the rules of the County Court, and I, like him, am satisfied that our powers under this rule are certainly not as extensive as the powers of the County Court Judges under their similar rule. To the County Court Judges there is clearly reserved a certain limited latitude in considering their own errors. I am quite satisfied that so far as we are concerned, we have no power either to meditate upon our own errors, or perhaps more pleasurably upon each other's errors. The matter is put beyond doubt by the wording of the rule:

> "An application," says the rule, "of a re-hearing of a cause heard by a judge alone where no error of the court at the hearing is alleged."

That, and that alone, is reserved for the consideration of a Divisional Court. Therefore, in this case it falls to be considered whether the present case is one which falls within that rule. Counsel on both sides are agreed that it does fall within the rule, and I am of the same opinion. I think, in the nature of things, the cases which can fall within such a rule must be comparatively few. The rule must contemplate, I think, something more than the bare cases that are covered by the High Court rule of cases in which judgment has been given by default. It would obviously have been unnecessary to preserve in the year 1924 a special rule for that purpose, it would have sufficed to let the matter be dealt with under Rule 97 of those same rules of 1924, and leave it to the general rules of the Supreme Court. Therefore, it is contemplated that the Divisional Court here shall have some jurisdiction to deal with what I may call domestic matters or matters of procedure. I am not sure that it is not the proper way to regard this case to say that it concerns a suit which is not properly constituted in that there has been a failure in an indispensable step of the procedure. One then turns to enquire: But is it the fault of anyone concerned in the administration of justice

here that that indispensable step was not complied with? Clearly it could not be the fault of the Court, for everyone must be agreed upon reading his evidence that the Court had ample evidence upon which to act and could, as both counsel agree, not have acted in any other way; nor could I see that any enquiries of the Court could have in any way dealt with this subject so as to ensure that that indispensable step, the service of the petition, was complied with. Whether in truth and in fact the step was complied with formally in that service was made does not, I think, affect what is asked for here, because whether in truth and in fact the petition was actually put into the hands of the respondent, or not, there is, I think, sufficient in the material before us to make us feel at least gravely dissatisfied as to whether she had any real knowledge of what was going on. That in itself seems to me to be ground for a re-hearing. There is one other matter which I should perhaps deal with. It has given my Lord here some particular matter for doubt as to whether he ought to have been one of those who considered, or re-considered, this question in that he was himself the trial judge. I take the view which was put forward by Mr. Glazebrook that not only is it not wrong that the judge who is the trial judge should be a member of the Divisional Court in a matter of this kind, but I think it is both right and desirable that he should, if possible, be a member of the Court which considered the question of re-hearing. It is to be observed that in no sense is any action of his impugned, no error by the nature of things can be imputed to him, and his recollection, a little hazy, perhaps, but nevertheless probably refreshed as the matter goes on, is of inestimable assistance in dealing with this very limited class of case. Therefore, in my view, this Court was properly constituted in order to deal with this matter and had jurisdiction to deal with it. On the facts of the case, I think I need say nothing in addition to what my Lord has said. It is a case in which I think we could do no other than to give this woman an opportunity of being heard.

Solicitors: *Russell, Jones & Co.* (for the wife); *Maltz, Mitchell & Co.* (for the husband).

[*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

KITCHENER *v.* EVENING STANDARD CO., LTD.

[King's Bench Division (Atkinson, J.), **January 17, 20, 1936.**]

Time—Sunday entertainments—Advertisement—All-in Wrestling—No free admission—Sunday Observance Act, 1780 (c. 49) *ss.* 1, 3.

On 17 days between June 15 and Oct. 12, 1935, the defendants published advertisements of public exhibitions of all-in wrestling to be held on 17 Sundays between June 16 and Oct. 13, 1935. These advertisements set out the programmes and the prices to be charged. There was no mention of free admission, and it was proved that in fact there was no free admission. The plaintiff attended two of the performances advertised, on July 21 and July 28. In an action by the plaintiff for £850 penalties under the Sunday Observance Act, 1780, in respect of these advertisements the defendants contended that no offence was committed under the Sunday Observance Act, 1780, ss. 1 and 3, unless the entertainment was one for which there was a charge for admission, and that in this case, although a charge was made for a seat, nothing would be found in the advertisements which was inconsistent with free admission.

Held: (i) the advertisements infringed sect. 3 of the above Act; (ii) the plaintiff was entitled to judgment for the £850 claimed; (iii) the plaintiff was acting in the public interest in endeavouring to put the above Act in force.

Observations on the question of remission of the penalties.

[EDITORIAL NOTE. An action for penalties of this nature by a common informer has long been looked upon as a form of procedure, which, to say the least, is not to be encouraged. This case includes an important statement that the Legislature having seen fit in 1932 to leave the statute of 1780 intact in this respect, while allowing certain forms of Sunday entertainment, it must now be taken that enforcing its provisions is not only a proper procedure, but in the public interest. The other question of how far the Act was evaded by allowing "free admission" was discussed in *R.* v. *London County Council Entertainments Protection Association* [1931] 2 K.B. 215, which case was the immediate cause of the Sunday Entertainments Act, 1932 (c. 51).

As to the Sunday Observance Act, 1780, see HALSBURY, Vol. 27, pp. 423, 424, and for the Act in Full, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 4, p. 379. For Cases see DIGEST, Vol. 15, pp. 759, 760.]

Case referred to:

(1) *Williams* v. *Wright* (1897) 13 T.L.R. 551; 37 Digest 551, *119*.

Action by the plaintiff, Eric Edward Kitchener, acting as a common informer for £850 penalties from the defendants, the Evening Standard Co., Ltd., for publishing advertisements in the *Evening Standard* in breach of the Sunday Observance Act, 1780, s. 3.

The plaintiff complained that on each of 17 Saturdays between June 15 and Oct. 12, 1935, the defendants printed and/or published an advertisement of a public exhibition of all-in wrestling to be held on the Sunday following the date of the advertisement. The advertisements set out the programmes and the prices to be charged. The plaintiff attended performances on July 21 and July 28.

Gerald Gardiner and *R. Lawrence* for the plaintiff.

Paley Scott, K.C., and *St. John Field* for the defendants.

ATKINSON, J.: In this case Mr. Eric Edward Kitchener is suing the Evening Standard Company, Limited, for penalties for publishing advertisements in the *Evening Standard* in breach of 21 Geo. III, c. 49, s. 3, "An Act for preventing certain abuses and profanations on the Lord's Day, called Sunday"; he claims in respect of advertisements in 17 issues. I think all the issues are on a Saturday, Saturdays between June 15 and Oct. 12. The advertisements are all in respect of performances to be given on the following Sunday. It is not contested that the evidence has established that the defendants are the owners and printers of the newspaper. The relevant words in sect. 3 are, "That any person advertising, or causing to be advertised any public entertainment or amusement . . . on the Lord's Day, to which persons are to be admitted by the payment of money, or by tickets sold for money, and any person printing or publishing any such advertisement, shall respectively forfeit the sum of £50 for every such offence, to any person who will sue for the same." There is no doubt that the advertisements complained of advertised all-in wrestling exhibitions on the Sunday following the date of the advertisements in the afternoon at the New Vale Hall, Kilburn, and in the evening at Lane's London Club, 11, Queen Street, Hammersmith Broadway. The programmes are set out, I think, in all the advertisements, and the prices to be charged. Evidence was given as to two of the displays, that on July 21 and that on July 28 at the hall in Hammersmith, that is, the hall at 11, Queen Street, Hammersmith Broadway. The plaintiff saw both these entertainments. His description of what took place was not challenged, and I am satisfied that his evidence was true. He had to pay to go in the sum of half-a-crown on each occasion, and there was, in fact, no free admission. There is no doubt that the performances were within sect. 1 of the Act; when I say within sect. 1 of the Act, I mean were infringements of sect. 1 of the Act, and the question here is whether the advertisements were within sect. 3. The first matter that arose was a matter of amendment, whether I should allow certain amendments of a very trivial nature, which the plaintiff wished to make, without, however, admitting the necessity for so doing. There were four in number. The first was to alter the word "of" to "on" in the title of the Act; the next was to alter the date in the list of displays, the date of July 29 to 28; the next was to substitute "Broadway" for "W.6." in the address of the Hammersmith Hall; and the last was to alter the description "New Vale Hall" to "The Vale Hall" in respect of the advertisement on Oct. 12.

Mr. Paley Scott urged very strongly that no help should be given to a plaintiff in an action based upon this statute. He said there were

no merits in the action, nothing to suggest that the defendants had not erred in ignorance of the facts that the advertisements were illegal or that the exhibitions were objectionable. So lately as 1932 the Legislature has had this statute under consideration. Certain amusements were then taken out of it, but otherwise Parliament thought fit to leave the law as it was. This is not a case involving an isolated breach of either sect. 1 or of sect. 3. It is alleged that these illegal performances were given persistently Sunday after Sunday, performances which were not merely illegal in that they were forbidden by the statute, but which, in the opinion, I should imagine, of most decent people, are unsuitable entertainments for Sunday. If ever the public interest can demand that this Act should be enforced, it demands it to stop performances of all-in wrestling on Sunday. I should imagine that six days and six nights in the week are quite enough for such displays. The plaintiff, whatever his motive, is, in fact, acting, I think, in the public interest in endeavouring to put the Act into force. I am quite satisfied that he genuinely disapproves of what he saw and genuinely thinks that these exhibitions ought to be stopped. Of course, he has been led to take these proceedings because of the inducement offered by the Act; but, after all, that is exactly what Parliament intended and hoped. In the absence of any evidence, I cannot accept Mr. Paley Scott's suggestion that the defendants were ignorant of the fact that they were breaking the law or that they were ignorant of the nature of these entertainments. The whole matter of this Act has been very much to the fore within the last few years, and the defendants must have known, I should imagine, that they were advertising illegal performances. Those responsible for running a great paper like this must surely know with precision what advertising is legal and what advertising is illegal, and they must be taken, I think, to know something about the nature of what they are advertising and to know something about all-in wrestling. Between the columns of advertisements in, I think, all these papers there is a quantity of small print; it is under a heading, "Weekly Sports Guide," and this little article, shall I call it, printed in rather small type, has certain initials at the end, "W. J. S. H.," rather suggesting, or, at any rate, apparently wishing the public to suppose, that this little article is not part of any advertisement, but is contributed by some writer employed by the paper. Be that as it may, Mr Paley Scott says that, of course, it is all advertising in disguise. It may be, but, at any rate, I have picked out two of these papers, the one of July 20 and the one of October 12, in which these articles describe the sort of performance which is being given. The one of July 20 contains a reference to "the opening tournament." "At the opening tournament a mere handful of spectators attended, and from many quarters attacks and hostile criticisms were levelled at the alleged 'barbaric'

sport." In the one of Oct. 12 there is a similar column : "In December, 1930, before an audience of less than a hundred persons, two wrestling matches under 'all-in' rules took place at Lane's London Club. This was followed by outbursts in many quarters insisting that this 'barbaric and crude spectacle must be abolished,' whilst others predicted that it would quickly die a natural death. Grim stories were circulated of eye-gouging, biting, and other ruthless tactics employed by the participants, and the term 'all-in wrestling' could, it seemed, be only uttered with a shudder." So that, both at the beginning and at the end of these advertisements, there appears in the defendants' own paper a description of what was going on, not with any idea of contradicting the accuracy of these descriptions, but accepting them and inserting them doubtless to help to attract people who like that kind of display. So that it is impossible to suppose that the defendants did not know something about the nature of the entertainments which they were advertising. I may be wrong, but I think in this case a judge ought to be anxious rather than slow to make amendments, and amendments which are obvious and trifling and which must have misled no one. I, therefore, allow them all.

The defence rests upon the proposition that no offence is committed either under sect. 1 or under sect. 3 unless the entertainment is one for which there is a charge for admission. If there is free admission, although a charge may be made for a seat, an entertainment is not within the scope of the Act, and it is said that in this case, if you look at the advertisements, there is nothing there which is inconsistent with free admission. This contention raises the construction of sect. 3. Three views have been presented. The first, which was presented by Mr. Gardiner in opening, as I understand it, is this : an advertisement speaks for itself. It does not matter whether the exhibition which is advertised is, in fact, given at all or whether, if given, no charge is made for admission. The only question is : does the advertisement advertise a performance on a Sunday which, according to the advertisement, is one at which people have to pay to go in ? "Well," says Mr. Paley Scott, "if that is the true view, there is nothing in any one of these advertisements which is inconsistent with free admission." The next view was one suggested by Mr. Paley Scott, and that was this, that unless there is in fact an illegal entertainment, there can be no breach of sect. 3, that an advertisement cannot be held to be within sect. 3 unless in fact it is followed by a performance which is in breach of sect. 1. He says that, if he is right in presenting that view, then there is no evidence, except as to two dates, that any performance was in fact given at either of these halls. The third view, which I gather was the one adopted in Mr. Gardiner's reply, was based upon these words, or, rather, emphasises the words "to which persons are to be admitted

by the payment of money," and the suggestion then made was that at any rate an advertisement must be one which relates to a performance for which it is intended that a charge shall be made for admission. I do not think that the question of whether an advertisement is illegal can depend upon what is in fact done. If that was so, an advertisement plainly unlawful according to its terms, and which plainly stated "No free admission" would not be a breach of sect. 3 if the police stepped in at the last moment and stopped the performance. I cannot see any words in the section to justify that view. There is nothing to my mind there to suggest that the performance must indeed take place and that the performance must indeed in itself be illegal. The only authority of which I know, or at any rate which has been called to my attention, as to the proper interpretation of this section is *Williams* v. *Wright* (1). The report of the judgment is very short, but still I think it is clear enough to afford a guide to the proper interpretation of the section. In that case the advertisement was of a concert, and the relevant part as to prices was this: "Tickets, 1*s.* 0*d.*, 2*s.* 0*d.*, 3*s.* 0*d.*, and 5*s.* 0*d.*, at Robert Newman's box-office, Queen's Hall." The concert took place and in fact there was free admission. There was printed on the tickets sold: "Admission Free. Reserved Seat, 1*s.* 0*d.*"; I suppose as to the other seats it was: Reserved Seat, so much—2*s.* 0*d.*, 3*s.* 0*d.*, and the like. At any rate, on apparently every ticket were the words "Admission Free," and it was clear that a charge was only being made for the seat. It was held there by Collins, J., as he then was, that there was nothing wrong about the advertisement, and he said this, that "He decided the case on Mr. Russell's second point, that on the ticket was printed 'Admission Free.' The fact that 1*s.* 0*d.* was charged for a reserved seat was not incompatible with the admission being free. The statute spoke of admission, not to a seat, but to an entertainment." I think that what that amounts to is this, that in that case the learned Judge thought that it was not proved that the concert advertised was one to which it was intended that the public were to be admitted only on payment of money. It was proved that in fact admission was free. He took the view that the advertisement was consistent with such an intention. Therefore it was impossible to say that the advertisement was of a concern to which the public were to be admitted on payment. I cannot think that the case would have been decided the same way if in fact there had been no free admission. I think the argument as to the advertisement being consistent with free admission was treated in this way: it is a question of intention. If you have it proved that in fact there was free admission and you have an advertisement which is consistent with free admission, it is impossible to find that it was at any time intended that there should be no free admission, and, therefore, you could not find as a fact that the

advertisement was one which infringed sect. 3. But if in fact there had been no free admission, I am pretty certain the learned Judge could not have held that it had not been intended to hold an entertainment to which there should be no free admission. It seems to me that, treating as a question of fact as to what was intended at the time of the advertisement, when you have got it proved that the promoters never meant that there was to be no free admission, that there was in fact free admission and there was nothing to contradict that intention in the advertisement, you cannot very well find as a fact that it was an entertainment to which the public were to pay for admission. I think that that case supports the third view presented, that you have got to look at the position at the time of the advertisement to see what was intended, what in truth was being advertised. You may, in order to get at what the intention was, look at what was done, because after all that is perhaps the best evidence of what the promoters had been really intending. You may get evidence of that intention quite clearly from the words of the advertisement. If the advertisement made it perfectly plain that there was to be no free admission, again that would probably be conclusive evidence as to what the intention was. You may have other evidence from any quarter as to what was intended. I think it is a question of fact, and to decide that question of fact the Court can look at what was really done, can look at the words in the advertisement or consider any other relevant evidence. Applying that principle to this case, the advertisement relating to the Lane's London Club, Hammersmith Broadway, ended up in every case with the words "Prices 3*s.* 6*d.*, 2*s.* 0*d.*, 1*s.* 6*d.*, all reserved." That to my mind means this, that all the seats are capable of being reserved at one of those prices, and I am satisfied that no one could infer from that that there was any free admission. In fact, we know that on the two dates with regard to which evidence was given there was no free admission; the two dates were July 28 and 29. I think the evidence as to those two dates proves what the promoter—Mr. Lane, I am assuming for the moment—meant by his advertisement, and I am driven to find as a fact that the performance advertised at Lane's London Club was on each occasion a performance to which persons were to be admitted only on payment, that that was the meaning of the advertisement. It was what the advertiser meant; it was what anybody reading the advertisement would take it to mean. As to the Vale Hall, or the New Vale Hall, in all but one case the Vale Hall, the prices were described in this way: "Prices: Reserved 4*s.* 6*d.*, 3*s.* 6*d.*, 2*s.* 0*d.*, Unreserved 1*s.* 0*d.*" Again I am satisfied that the advertisement makes it quite plain that no one can get in without payment. It means that there are certain seats which may be reserved in advance, that there are a number of seats which cannot be reserved, that to get in you have to pay 1*s.* 0*d.* and take your chance

of a seat in the unreserved part. After all, it is a form of advertisement with which we have all been familiar from our childhood with regard to theatres. It is only quite recently, I think, that a few theatres reserved seats in the pit. To take the position there, "Pit, unreserved," so much, everybody knows that you pay to go into the pit; if there is a seat you get it, and you take your chance whether there is or not. If there is not a seat, you take your chance of standing at the back. I have no doubt that nearly everyone in Court has frequently taken a chance in that way. Everybody would read the advertisement in that way. There again I think one is entitled to bear in mind the two performances given at the other hall, which of course show that Mr. Lane never had any intention of letting people in free. He never pretended to be a philanthropist, and I am perfectly satisfied that the people who put in the advertisement and anybody who read it never had the faintest doubt about the matter of charges, and that no one would suppose for a moment that they could get in for nothing if they were prepared to stand. At any rate, in the absence of any evidence to contradict this inference, I find as a fact that the advertisements as to the Vale Hall were advertisements of performances to which the public were to be admitted on payment. Of course, it is enough to condemn these advertisements if they are wrong as to one of the halls in question; if they are wrong as to one the advertisement is an infringement of sect. 3; but, in my judgment, the advertisements are an infringement of sect. 3 as to both of the halls.

That being so, it seems to me that the alleged offences are complete and that the plaintiff is entitled to judgment for the sum claimed of £850. Of course, the defendants will understand that it is all or nothing, that a judge deciding a case under this Act has no discretion at all as to what he is to award. It is a penalty which is either incurred or not incurred, and if as a matter of law it has been incurred, the penal y has got to follow. Therefore there must be judgment for the full amount with costs. If the Home Secretary attaches any importance to the judge's view in considering whether there ought to be remission, I do not want anything I have said or am saying to be taken to indicate that I think there ought to be full remission; but I do think that there ought to be some, because if a view is taken that something which is going on is wrong, I think that an intending plaintiff ought to move quickly. It seems to me wholly unreasonable to lay by and let an offence be repeated week after week and then come forward with a very big claim of this kind. So that if anything I say has any bearing, that is a principle which I am sure ought to be taken into consideration.

Solicitors: *Lewis & Co.* (for the plaintiff); *Withers & Co.* (for the defendants).

[*Reported by* C. L. Whishaw, Esq., *Barrister-at-Law.*]

DOMINE *v.* M. COHEN & CO.

[COURT OF APPEAL (Slesser and Scott, L.JJ., and Eve, J.), **February 5, 1936.**]

County Courts—Execution—Levy—Stay—Discretion of Judge.

Plaintiff obtained judgment against the defendants for the sum of £53 8*s.* payable in instalments of £2 monthly. One of these instalments being in arrear the plaintiff levied execution for the whole amount then owing and seized certain property. A friend of the defendants then paid the bailiff the whole amount outstanding and costs of the execution, and was given a receipt stating that the sum was paid as a deposit pending an application to the Court. It was intended that upon an application to the Court the defendant should pay the one instalment and the costs of execution and that a new order for payment for instalments should be made. The order made by the Court followed these terms, but went on to add that if the defendant did not pay the costs of execution, the so-called deposit should remain in Court until further order.

HELD: this course was quite irregular as it did not appear whether the friend paid the money as agent of the defendants or otherwise. If he paid as such agent the debt was discharged and the execution was at an end, and no further order could be made with regard to it. If, in fact, he was not an agent of the defendants no order could be made in respect of the said sum paid as a deposit as the person paying it was not a party to the action.

[**EDITORIAL NOTE.** What was done here was no doubt done with the intention of helping the debtor, but without quite appreciating its legal effect. As this or some similar practice seems to be often employed in such matters, it is very convenient that the Court of Appeal should have pronounced its views upon them. What was attempted to be done was to deposit the whole sum leviable under the execution with the bailiff until such time as an application could be made to the Judge for what was in effect a fresh order for instalments. Difficulties arose here from the fact that it was not clear whether the party paying the deposit was the agent of the debtor or not.

AS TO THE DISCRETION TO STAY EXECUTION, see HALSBURY, 2nd Edn., Vol. 8, p. 325, and FOR CASES, see DIGEST, Vol. 13, pp. 515, 516.]

Case referred to:

(1) *Attenborough* v. *Henschel* [1895] 1 Q.B.833; 13 Digest 515, *651.*

APPEAL from an order of the Judge of the Shoreditch County Court made on Oct. 24, 1935, setting aside a warrant of execution and ordering a sum of £41 19*s.* 8*d.*, paid to the bailiff of the Court by a person not a party to the proceedings by way of a deposit pending the hearing of the application, to be repaid to him, but in default of the payment by the defendant of a sum of £2 11*s.* 8*d.* costs, the sum of £41 19*s.* 8*d.* to remain in Court.

The appellant, the plaintiff in the Court below, lent a sum of money to the defendants, a firm of furniture manufacturers. In March, 1935, the plaintiff brought an action for the recovery of the debt and obtained judgment for a sum of £53 8*s.*, which included costs, to be paid by

instalments of £2 each month. The October instalment not being paid, execution was levied at the defendants' premises for the whole amount of the balance, £40 0*s.* 9*d.* A Mr. L. Lewis, a friend of one of the defendants, paid the bailiff a sum of £41 19*s.* 8*d.*, which covered the whole amount and costs, upon the condition that the bailiff should enter on the official receipt words to the effect that the money was paid as a deposit pending an application to the Court. The bailiff gave Mr. Lewis a receipt on the official form (F.R.1., Mayor's & City of London Courts Funds Rules, 1934), as follows :—

RECEIVED the 22nd day of October, 1935, of the above-mentioned defendant the sum of Forty-one pounds nineteen shillings and eight pence.

On account of debt and costs	£40	9	0
Appraisement fees	1	5	6
Stamp and papers		5	2
	£41	19	8

Paid by Mr. L. Lewis, as deposit pending application.

H. Palmer, *Bailiff.*

The words "Paid by Mr. L. Lewis as deposit pending application" were written in manuscript. The bailiff paid the money into Court, and on the same day the defendant Mrs. M. Cohen gave notice that she intended to apply for a stay of execution on the grounds :—(1) that she had paid the instalments regularly up to September, and in October had only been two or three days late ; and (2) that the delay was through bad trade and demands by other creditors.

The Judge heard the application on Oct. 24, and had before him the fact that the sum of £41 19*s.* 8*d.* had been paid into Court. He made the order hereinafter set out.

The plaintiffs appealed.

H. V. Lloyd Jones for the appellant : The Judge heard no evidence and the only material fact before him was the existence of the receipt. A warrant for the execution having issued, the Judge was *functus officio.* He had no power to order repayment of the sum to Mr. Lewis on an application of the defendant, Mr. Lewis not being a party to the action. The solicitor appearing for the plaintiff took these points, but they were not fully argued, as the application was an interlocutory one. No note of the proceedings exists and the only judgment delivered was in the terms of the order. The Judge gave no reasons. The Judge was correct in issuing execution for the whole sum after a default upon one instalment (County Courts Act, 1888, s. 149.) There is no provision or statute which entitles a judge to set aside a warrant of execution or even to stay the execution on these grounds where no irregularity or illegality of execution is alleged.

The levy of execution is regulated by the County Court Rules, 1935, Ord. 25, r. 19, thus :

(1) Where a defendant has made default in payment of the whole amount awarded by the judgment or order, or where the judgment or order was for payment by instalments of an instalment thereof, a warrant of execution may issue against his goods without leave ; and such execution shall be for the whole amount of judgment or order and costs then remaining unsatisfied, or in the case of an order for payment by instalments, for such portion thereof as the Court shall order, either at the time of making the original order or at any subsequent time.

Scott, L.J. : County Courts Act, 1888, s. 149, upon which this rule is founded, does not say "execution may then, *with leave of the court*, issue", It leaves it to the party.

John Harington, for the respondents, the defendant firm : The application was made under the County Courts Act, 1919, s. 23, which is substituted for sect. 153 of the Act of 1888.

Under County Court Rules, 1935, Ord. 25, r. 16 (1) and Ord. 12, r. 11 (3) the judge or registrar may make an order absolute in the first instance or may make such other order or give such direction as may be just. Under the rules the defendant was entitled to make her application and the Judge to make his order. The sum of £41 19*s.* 8*d.* was paid to an officer of the court.

Ord. 23, r. 15*a* (2) provides as follows :

Where any such order is made, then

(*a*) if execution has issued the warrant shall be returned, but the judge may order the debtor to pay the costs of the warrant and any fees or expenses incurred by the high bailiff before the recall of the warrant, and may authorise the high bailiff to sell a portion of the goods seized sufficient to realize such costs, fees and expenses and the expenses of the sale.

The order made in this case is one made under the County Courts Act, 1919, s. 23 which gives power to stay execution even after the goods have been seized and is the foundation for Ord. 23 r. 15*a*.

Under sect. 153 of the Act of 1888 the Judge could only stay execution "from sickness or other sufficient cause." In *Attenborough* v. *Henschel* (1) the Court held that the words "sufficient cause" must be construed as *ejusdem generis* with sickness and cannot include want of means. The Act of 1919, by sect. 23, removed the limiting words and substituted "from any cause." The Judge always had the power to stay execution when the limiting conditions were satisfied, and now there are none.

The defendant applied for a stay of execution. If the Judge had ordered the execution to be stayed he would have been correct. This Court is asked to amend the order by substituting the word "stayed" for the words "set aside."

The provision in the order that the money should be paid to Mr. Lewis was ancillary and fell within the Judge's discretion to make "such order as may be just."

Slesser, L.J.: The money was irregularly in the hands of the bailiff. who has only the power of a sheriff under a writ of *fieri facias*. He has no authority to make a special arrangement of his own.

Scott, L.J.: The condition which the Judge made in his order treats the sum as a payment to secure a judgment debt. He cannot do that.

Slesser, L.J.: The Judge was influenced in the exercise of his discretion by this irregular transaction. Mr. Lewis may have paid this money in as an agent. Before any decision can be given, he must be made a party and be heard.

Scott, L.J.: If Lewis was an agent of the defendants for the purpose of making the payment, the defendant would not be in a position to satisfy the Judge under sect. 23 of the 1919 Act that he was unable to discharge the debt, because *ex hypothesi* he would have discharged it. The Judge, by the form of his order, has made Lewis a party.

Harington: The order in my submission can be amended.

Slesser, L.J.: In this case the plaintiff lent money to the defendant, one Mrs. Cohen, who is a member of the firm of M. Cohen & Co. The sum was £50 odd and ultimately judgment was obtained for £53 0*s*. 8*d*. An order was made whereby the sum should be paid off in instalments of so much a month. The money was duly paid for some time, but in Oct., 1935, the instalment was not paid. Thereupon the creditor obtained leave to issue execution on Oct. 21 and a bailiff was sent for that purpose and execution levied on certain suites of furniture which were in the possession of the defendant. On Oct. 22 while the execution was being levied, a Mr. Lewis paid to the bailiff a sum of £41 19*s*. 8*d*. being the debt and certain fees and stamp fees, and that sum would have been sufficient to satisfy the whole debt. On the same day the borrower, Mr. Cohen, applied to the Judge of the County Court for an order that the warrant of execution issued by the plaintiff be stayed for the following reasons:

1. That the Order made by the Court on the 15th March, 1935, was £2 per month, and I have paid these instalments regularly up to September. This month I was two or three days late in paying my instalment, and the plaintiff issued a warrant of execution against me.

2. The reason for my delay in paying this month's instalment was through bad trade and demands made by other creditors. In these circumstances I apply to the court for the warrant of execution to be stayed so long as I pay £2 per month.

The County Courts Act, 1919, s. 23, a section which is substituted for sect. 153 of the earlier County Courts Act reads thus:

If at any time it appears to the satisfaction of the judge that any party to an action or matter is unable from any cause to pay and discharge any debt, damages, costs, or other sum recovered against him, or any instalment thereof, it shall be lawful for the judge, in his discretion, to suspend or stay any judgment, order or execution given, made or issued in such action or matter.

In the earlier Act that power was limited by the words in sect. 153 : "From sickness or other sufficient cause." In *Attenborough* v. *Henschel* (1) it was held that the mere inability of the defendant to pay owing to want of means was not a sufficient cause. Now, however, that has been altered and where the defendant can satisfy the Judge that she cannot pay the whole or an instalment for want of sufficient means, that is a ground from which the Judge may if he thinks fit exercise his discretion and stay the execution.

That was strictly what the defendants asked the learned Judge in this case to do, but the order made which is a complicated one goes very much beyond that. It is an order of the Court dated Oct. 24, 1935, we understand, after some five minutes consideration when no evidence had been proposed by either party, to this effect :

> Upon hearing the application of the defendant by his counsel and upon hearing the plaintiff by his solicitor and upon the defendant undertaking to discharge the balance of the debt and cost recovered against him in this action, amounting to £39 8*s*., by regular instalments of £2 a month to the Registrar of this Court, the first of such payments to be made on 15th November, 1935 ;
>
> And upon the payment by the defendant to the Registrar of this Court on or before the 31st October, 1935, of the sum of £2 11*s*. 8*d*., being the costs occasioned by the issue of the execution in this action ;
>
> It is ordered that the warrant of execution be set aside and that the sum of £41 19*s*. 8*d*. paid to the bailiff of this Court by Mr. L. Lewis by way of a deposit pending the hearing of this application be repaid to him ; but in default of the payment by the defendant of the sum of £2 11*s*. 8*d* to the Registrar of this Court, as aforesaid, then the sum of £41 19*s*. 8*d*. shall remain in Court to attend the further order of the Court.

The first observation I have to make is that it has not been ascertained in this case whether the money Mr. Lewis paid the bailiff was paid as the agent for the debtor or was given for the purpose of discharging the debt. The actual language on the receipt is "Paid by Mr. L. Lewis as deposit pending application"—speaking for myself, I am not quite able to understand what legal effect this may have. But at any rate we do not know whether in law the debt has been paid or not. If it has, there is no further subject matter for execution and no question of the exercise of discretion by the Judge in staying execution can arise. If on the other hand it is not so paid and is still the property of Mr. Lewis then it appears that Mr. Lewis by this order has been, if not deprived of his property, at any rate kept out of the enjoyment of it to this extent, that if the defendant defaults in the payment of £2 11*s*. 8*d*. the sum of £41 19*s*. 8*d*. is to remain in Court "to attend the further order of this Court." The matter therefore will have at some time to be considered ; whether this debt has in fact already been paid and discharged by the payment of Mr. Lewis and if either party feel that, if they are so advised, they ought to bring Mr. Lewis before the Court we give liberty to add Mr. Lewis as a party to these proceedings. That is the first question

but in any event it is impossible to come to the conclusion at present that the learned Judge has exercised a discretion under sect. 153 because in considering whether he should stay execution on account of the allegation by the defendant of want of means he appears from his order to have allowed his discretion to be affected by a consideration of this payment made to the bailiff by Mr. Lewis of £41 19*s.* 8*d.* That seems to us to show that the discretion has not been exercised because of this extraneous consideration of Mr. Lewis's payment. I think therefore that there will have to be a new trial of this issue. It will have to be decided first whether the debt has already been discharged; secondly the learned Judge will have to consider whether the allegation of the defendant of insufficiency of means is or is not a ground on which he will think fit to exercise his discretion under the Act; and thirdly, if he does so exercise his discretion he will bear in mind that he has not, as here appears in this order, a power to set aside a warrant of execution, but only to suspend or stay. For these reasons this appeal succeeds and we will consider the question of costs when my learned brothers have given judgement.

Scott, L.J.: I only want to add one or two considerations. I know of no statutory provision under which the County Court could receive a payment from a third party for the purpose of guaranteeing an ultimate payment of the debt which appears to be the view taken by the Registrar in the note upon the receipt given for the payment in question. If there was no statutory power in the Court to receive a payment tendered not as an absolute payment but only as a conditional payment by a third party acting in effect as guarantor then the whole thing was a nullity and the payment would have to be returned simply to Mr. Lewis and the documents of the Court including the Judge's order which is under appeal before us will have to be corrected simply because there has been a complete misapprehension as to what it was to do.

The Judge, of course, in considering the matter when it comes back to him would, I think, properly take into account an offer by a friend of the defendant to make payment of the judgment debt on his behalf. But the Judge could not decide that that was sufficient ground for holding that the defendant was unable to pay, unless he was satisfied that the money was really put at the disposal of the defendant. If he was satisfied that that was the case then I think it would be very difficult to avoid the conclusion that it has been paid into Court on behalf of the defendant and that the judgment debt was thereby discharged. These matters he will have to consider when the issue is before him. I am expressing no opinion at all about it but there are several issues of fact that have to be cleared up.

Eve, J.: concurred.

Appeal allowed with costs. The costs of the application to be in the

discretion of the Judge. Liberty to either party to apply to the Judge to add Mr. Lewis, and generally. Stay of execution to continue until the hearing of the case in the County Court.

Solicitors: *J. E. Bering Gomm & Co.* (for the appellant); *Saunders, Sobell Greenbury & Co.* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

HARDMAN *v.* CAUSTON.

[COURT OF APPEAL (Slesser and Scott, L.JJ., and Eve, J.), **January 31, 1936.**]

Practice—Costs—Remitted action—Claim reduced in High Court by giving credit—No judgment in High Court—Exercise of discretion—County Courts Act, 1919 (*c* 73) *ss.* 11, 12.

An action was brought in the High Court for £94 5*s.* 11*d.* The Master in Chambers reduced the claim to £43 5*s.* 11*d.* by giving credit to the defendant for £51, gave the defendant leave to defend as to the remainder, and remitted the case to the County Court. The defendant then entered a counterclaim, which the Court of Appeal found to be unfounded, but the facts upon which the counterclaim was based further reduced the claim to £14 10*s.* 11*d.*

HELD: (i) in the circumstances there was no judgment in the High Court upon which costs on the High Court scale could be given.

(ii) the Court of Appeal exercising the discretion vested in the County Court Judge by the County Courts Act, 1919, s. 12, awarded costs on Scale "B" throughout the proceedings, refusing to make three separate orders as to costs.

[**EDITORIAL NOTE.** Confusion has arisen in this case between a claim reduced by giving credit for sums of money paid and a claim which is reduced by giving judgment for part thereof and leaving the action to proceed as to the remainder. It seems clear that no costs on the High Court scale can be given where no judgment (usually for part of the claim) has been given in the High Court. It would appear from *Davies* v. *Davies* [1928] 1 K.B. 364; Digest Supp. County Courts, No. 404b., that if the County Court Judge exercised his discretion in the same way as the Court of Appeal did here, he would have to give a certificate under the County Courts Act, 1888, s. 119.

AS TO COSTS IN REMITTED CASES, see HALSBURY, 2nd Edn., Vol. 8, p. 357, para. 758, and FOR THE CASES, see DIGEST, Vol. 13, pp. 490-492.]

Case referred to:

(1) *Jenkins & Co.* v. *Simon* [1926] 1 K.B. 111; Digest Supp.

THIS was an appeal by the plaintiff from an order made by His Honour JUDGE HOGG, sitting at Lambeth County Court on Oct. 21, 1935, whereby he adjudged that the plaintiff was entitled to judgment on his claim for £43 5*s.* 11*d.* with costs on the County Court scale, and that the defendant,

Eliza Jane Causton (a married woman), was entitled to judgment on her counterclaim for £28 15*s*. 0*d*., with costs on the County Court scale, and asked that the said order might be set aside and that judgment might be entered for the plaintiff for the sum of £14 13*s*. 3*d*., with costs on the High Court scale until remission, and costs on the County Court scale thereafter, and that the counterclaim of the above-named defendant be dismissed and judgment be entered therein for the plaintiff on the County Court scale.

Geoffrey Hutchinson for the appellant

N. H. Moller for the respondent.

Slesser, L.J. (delivering the judgment of the Court): In this case, the plaintiff, Mr. Hardman, originated his suit in the High Court to recover a sum of £94 5*s*. 11*d*. The defendant swore an affidavit in which she denied being liable, as the claim included two amounts for materials supplied to the plaintiff, which amounts she had since paid. She said that some of the work had not been done satisfactorily, some not at all, and some had to be done again. The matter came before the Master in Chambers, who made an order that the plaintiff's claim be reduced to £43 5*s*. 11*d*., by giving credit to the defendant of the two sums mentioned in the affidavit, and it was ordered that the defendant be admitted to defend the action and that it be transferred to the County Court, and that the costs be in the discretion of the County Court Judge. A surveyor was ordered by the County Court Judge to inspect the work, and on Oct. 18, 1935, he made a report. He said that as a result of the investigation he found that the defendant's counterclaim succeeded to the extent of £28 15*s*. 0*d*., and the plaintiff should receive £14 10*s*. 11*d*. only in full settlement of both claim and counterclaim. When the case was remitted the defendant had put in a counterclaim, in which she counterclaimed £33 16*s*. 2*d*. held by the plaintiff on her behalf. The learned County Court Judge decided that the plaintiff succeeded on the claim and the defendant succeeded on the counterclaim. In our opinion there has been a confusion. The effect of the report, as stated by the surveyor, was that the plaintiff should receive a balance of £14 10*s*. 11*d*., after giving the defendant credit to the extent of the matters mentioned in her counterclaim, deducting them from the sum of £43 5*s*. 11*d*., which was the sum in issue remitted from the High Court. There should have been judgment for the plaintiff for £14 10*s*. 11*d*. and no more, because the defendant failed entirely on the counterclaim. The defendant must pay the costs of the counter-claim which she has lost. As regards the claim of £14 10*s*. 11*d*., that in itself carried costs on Scale "A." This being a High Court action which has been remitted, under the County Courts Act, 1919, ss. 11, 12, and *Jenkins & Co.* v. *Simon* (1), the plaintiff is entitled to the High Court costs down to the time of the remission. Where, in our opinion, the

learned County Court Judge was not exercising his discretion, was that he took the wrong view as to the counterclaim and the discretion as to costs was exercised on a wrong principle. We therefore act as though we were the County Court. We are not satisfied that this case can be properly brought within the judgment in *Jenkins & Co.* v. *Simon* (1). In the present case, there is no judgment for the £51 at all. In substance, it is said that the plaintiff has succeeded to that extent. It is not possible to say exactly what were the negotiations; but the plaintiff's claim was reduced, by giving credit, to £43 5*s.* 11*d.*, and the order was that the defendant be permitted to defend the action. The sum recovered was £14 10*s.* 11*d.* We are not going to make three orders as to costs, one on the High Court scale up to remission, one on Scale "A," and a third one on Scale "B" on the counterclaim. What we propose to do, in our discretion, is to allow the appeal, dismiss the counterclaim, and to allow the claim for £14 10*s.* 11*d.* with costs on Scale "B" throughout the proceedings. The appellant must have the costs of this appeal.

Solicitors: *Scott & Son* (for the appellant); *Simon, Haynes, Barlas and Ireland* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

MUSSON *v.* MOXLEY.

[King's Bench Division (Horridge, J.), **January 20, 1936.**]

Agency—Estate agent—Commission—Agreement for sale subject to deposit being paid within ten days—Failure to pay deposit—Repudiation by vendor.

The defendant verbally agreed to employ the plaintiff, an estate agent, to sell certain property. On July 14, 1935, the plaintiff obtained an offer from W. & Co. to purchase the property and he communicated this offer to the defendant, who accepted it by letter on July 6, 1935, subject to a contract being signed and a deposit being paid within "say 10 days." W. & Co. wrote on July 18, 1935, expressing willingness to pay a deposit, but only upon the contract being signed. No deposit was paid and on July 30, 1935, the defendant repudiated the contract.

In an action for commission alleged to be payable on the introduction of a willing purchaser:

Held: (i) on the evidence the condition as to the payment of a deposit within 10 days had not been waived by the defendant; (ii) the defendant was entitled to repudiate the sale upon the failure of the intended purchaser to pay the deposit within 10 days; (iii) if the condition had been waived the plaintiff's claim would have succeeded on the principle that where an agreement is "subject to contract" an agent is entitled to damages in lieu of commission in the event of non-completion of the contract due to default on the part of the vendor.

[**EDITORIAL NOTE.** In this case the purchaser appears to have been a willing purchaser subject to this; that he refused to pay a deposit until contracts were exchanged. The vendor had stipulated in accepting a preliminary agreement that the deposit should be paid within 10 days, and although his agreement with the agent seems to have been an open one he was held to be in order in making such a stipulation. As the deposit is usually paid on the conclusion of the preliminary agreement, the stipulation seems a very reasonable one to make.

As to Remuneration of Agents, see HALSBURY, 2nd Edn., Vol. 1, pp. 258-263, and for Cases thereon, see DIGEST, Vol. 1, pp. 508-512.]

Cases referred to:

(1) *Raymond* v. *Wooten* (1931) 47 T.L.R. 606; Digest Supp.

(2) *George Trollope & Sons* v. *Martyn Brothers* [1934] 2 K.B. 437; Digest Supp.

(3) *Keppel* v. *Wheeler* [1927] 1 K.B. 577; Digest Supp.

By a verbal agreement defendant on June 13, 1935, agreed to employ the plaintiff as his agent to sell certain property in High Street, Ruislip, and to pay commission upon the usual scale. On July 4, 1935, the plaintiff obtained an offer to purchase the property and communicated the same to the defendant, who accepted the offer subject to a contract being signed and a deposit being paid within "say ten days." No deposit was paid within the time specified and the purchasers were only willing to pay a deposit upon the contract being signed. On July 30, the defendant wrote to the plaintiff and repudiated the contract as no deposit had then been paid.

Harold Lightman for the plaintiff. It was an implied term of the

contract that the defendant would not by refusing to complete prevent the plaintiff from earning his commission. The defendant delayed execution of the contract and thus prevented the proposed sale being effected.

H. H. Maddocks for the defendant. The only agreement to sell the property was conditional upon the payment of the deposit within ten days. The agreement was one for payment of commission upon completion of the sale and not otherwise.

HORRIDGE, J.: This is a claim by an estate agent for commission earned by finding a purchaser for certain property owned by the defendant. There are two defences raised. First it is said: "I only agreed to pay commission if you found a purchaser who was willing to pay a deposit, say within 10 days." The defendant on July 30, 1935, wrote to the plaintiff and repudiated the contract, as the plaintiff's clients had not paid, up to that date, any deposit. The first question I have got to decide is whether that was a condition and whether it was ever waived. In my opinion, the letter of July 6 clearly imposes that condition. "I accept this offer subject to contract. The contract being signed and deposit being paid, say, within 10 days." No deposit was paid within 10 days, nor was it paid up to the time, at the end of the month, when the defendant wrote repudiating the transaction.

Was this condition ever waived? I cannot find anything in the correspondence that amounts to a waiver, but the plaintiff says that he told the defendant about Messrs. Wigram's letter of July 18, and it appeared to satisfy him, as he said he could pay the money to release the deeds, so that the contract could be put in hand. I do not think there is any evidence of waiver in that, and the defendant denies it. I cannot find anything, in the face of the defendant's denial, that he ever in any way waived it, and I cannot find that it is established even that he appeared to be satisfied. In these circumstances the plaintiff has not performed his portion of the contract, because he has not found a purchaser ready and willing to buy and pay a deposit within 10 days. Therefore, there must be judgment on that point for the defendant.

If I am wrong on that, I think the plaintiff is entitled to succeed, because the defendant would then, in refusing to go on with the contract, have prevented the plaintiff from earning his commission.

The case of *Raymond* v. *Wooten* (1) raised the very point, and in that case the Divisional Court held that as the contract was "subject to contract," therefore, the plaintiff could not recover. That case was considered in the judgment of GREER, L.J., in *George Trollope & Sons* v. *Martyn Brothers* (2), and he says at page 450:

> The appellants relied upon the decision of the Court of Appeal in *Keppel* v. *Wheeler* (3), but in my judgment this decision does not help them, as the Court held that the agents were entitled to their commission, but were liable in damages

for breach of a duty in not communicating an offer received for an additional price before the completion. I note that Bankes, L.J., says:

> In these circumstances, I am not going to discuss all the matters which have been debated in testing this question whether the agency had or had not determined, because it seems to me that an agent may well say "I have done everything which, assuming that the matter went through, would entitle me to receive my commission," and yet remain under the obligation of an agent to disclose such matters as the particular offer in this case.

The opinion expressed in my judgment, is, I think, inconsistent with the decision of Swift and Charles, JJ., in *Raymond* v. *Wooten* (1), but in my opinion that case was not rightly decided.

Therefore, if this is to be followed out logically, it means that in *Raymond* v. *Wooten*, where the defendant had refused to go on with the transaction, even though the contract was subject to contract. the plaintiff was entitled to damages in lieu of his commission, and that seems to me to be exactly this case. Therefore, if I am wrong about the deposit, the plaintiff would recover the amount he claims by way of damages.

The case relied upon of *Keppel* v. *Wheeler* (3), only raises the question of "subject to contract" in this way. The plaintiff was seeking to recover commission. The defendants said they would not pay the commission, and that the plaintiff was liable to them in damages because he had a subsequent offer which he had not communicated to them. The Court of Appeal said he ought to have communicated that offer, because as between the defendants and his purchaser he could have repudiated the contract at any time under the words "subject to contract," and therefore until the contract was absolutely put through the duty of the agent remained to communicate any further offer to him, but they held the plaintiff was entitled, notwithstanding the transaction had gone off, to his commission. Therefore, that is the only decision: that "subject to contract," leaves the matter open as between vendor and purchaser, and it is not a decision which interferes in any way with the right of the plaintiff to recover commission.

There must be judgment for the defendant on the ground that I have indicated, with costs.

Solicitors: *Frederick W. Brown* (for the plaintiff); *Collyer-Bristow & Co.*, agents for *Bird & Lovibond*, Uxbridge (for the defendant.).

[*Reported by* C. L. Whishaw, Esq., *Barrister-at-Law.*]

JACOBS *v.* JACOBS AND SOLOMON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), **January 22, 23, 24, 1936.**]

Divorce—Evidence—Overheard telephone conversations—Tapping of telephone—Refreshing memory—Costs.

The petitioner had caused the telephone line from his house to be tapped by means of a line taken to a room in another house hired for the purpose. He employed an enquiry agent to listen in to all telephone calls made from and received at his house, and to write down verbatim reports of the conversations. Some of the conversations were also listened to by the petitioner as well as by the enquiry agent.

Semble : evidence by the petitioner of the telephone conversations, which he had overheard between the respondent and the co-respondent, was admissible, and he might refresh his memory from the notes of these conversations which the enquiry agent had written at the time and which the petitioner had checked shortly after. Although some of the conversations were irrelevant, still their recording was necessary and the costs thereof should be allowed.

[**EDITORIAL NOTE.** The difficulty of obtaining evidence to support a petition for divorce is here surmounted in rather an unusual manner. The careful preparation made for safeguarding the admissibility and increasing the cogency of the evidence is noteworthy and takes full advantage of the law that a witness may refresh his memory from notes or memoranda made by another so long as he checks them at the time.

AS TO A WITNESS REFRESHING HIS MEMORY, see HALSBURY, 2nd Edn., Vol. 13, p. 754, and FOR THE CASES, see DIGEST, Vol. 22, pp. 469-476.]

Cases referred to :

(1) *R.* v. *Langton* (1876) 2 Q.B.D. 296 ; 22 Digest 470, *4937*.

(2) *Kingston's (Duchess) Case* (1776) 20 State Tr. 355, 537 ; 22 Digest 474, *4997*.

(3) *Dyer* v. *Best* (1866) 4 H. & C. 189 ; 14 Digest 270, *2766*.

Husband's petition for divorce.

R. F. Bayford, K.C., and *Geoffrey Tyndale* for the petitioner.

John Flowers, K.C., and *F. L. C. Hodson*, for the respondent.

Norman Birkett, K.C., and *H. B. D. Grazebrook*, for the co-respondent.

Bayford (opening the case) stated that the telephone line from the petitioner's house was upon the petitioner's instructions tapped and a wire run to another house specially taken for the purpose. In the latter house two receivers had been installed and were used, one by the petitioner and the other by a private detective, for listening to calls and conversations to or from the petitioner's house. These calls and the ensuing conversations were duly recorded by the private detective and upon the occasions when the petitioner was there almost immediately checked by the petitioner.

Flowers took the objection that these records were discoverable documents and had not been included in the affidavit of documents.

Bayford replied that the records were merely what the enquiry agent and the petitioner proposed to say in the witness box.

Upon the petitioner being asked to refresh his memory from the records it was argued that the records, though not made by the petitioner himself, were checked by him immediately after they were made and were available for the purpose. The following cases were referred to: *Kingston's (Duchess) Case* (2); *Dyer* v. *Best* (3).

Langton, J., referred to *R.* v. *Langton* (1). Objection to the use of the records for refreshing the witnesses' memory was withdrawn and Langton, J., stated, without deciding the point, that he thought the records were available for this purpose.

The respondent and co-respondent then ceased to contest the case.

On the question of costs, it was agreed for the co-respondent that the records of the telephone conversations included records of conversations between persons who were in no way connected with the suit. Records had been made of every conversation taking place while the petitioner or the private detective were listening. The costs should be restricted to such records as were material.

Langton, J.: I do not propose to make an order as to costs on this point as it is really a matter for the Taxing Master, but in my view the petitioner was well advised to have every telephone conversation recorded, irrespective of its relevance, and, had he failed to do so, the value of the records as evidence might conceivably have been impaired.

Solicitors: *Worthington Evans, Dauney & Co.* (for the petitioner); *Lazarus, Son & Co.* (for the respondent); *B. A. Woolf & Co.* (for the correspondent).

[*Reported by* W. A. Hammerton, Esq., *Barrister-at-Law.*]

CLUBB *v.* WIMPEY & CO., LTD.

[KING'S BENCH DIVISION (Charles, J., and a special jury), **February 3, 1936.**]

False Imprisonment—Giving in charge—Signing charge-sheet.

S., an agent of the defendants, thinking the plaintiff guilty of larceny, gave him into custody and signed the charge-sheet. S. stated in evidence: "I did give him in charge."

HELD: this amounted in law to false imprisonment, but no case of malicious prosecution was shown.

[**EDITORIAL NOTE.** This case appears to be one of some interest, as there is authority for the proposition that signing the charge-sheet is not conclusive evidence of the fact that the person signing was a party to the prosecution. Here it would appear that all the agent of the defendants did was to sign the charge-sheet, though it may be that his words "I did give him in charge," when properly construed in effect mean rather more.

AS TO A PRIVATE PERSON GIVING ANOTHER IN CHARGE TO A POLICE OFFICER, see HALSBURY, Vol. 27, p. 879, para. 1553, and FOR CASES THEREON, see DIGEST, Vol. 43, pd. 447-451.]

Cases referred to:

(1) *Walters* v. *W. H. Smith & Sons* [1914] 1 K.B. 595; 43 Digest 450, *783*.

(2) *Grinham* v. *Willey* (1859) 4 H. & N. 496; 43 Digest 447, *755*.

ACTION for damages for false imprisonment and malicious prosecution. Plaintiff was a contractor and was engaged on a contract for the defendants, a firm of builders and contractors. On Mar. 18, 1935, defendants, by their servant, Ernest Edward Studham, gave plaintiff into the custody of the police on a charge of stealing certain air-inlet pipes, the property of the defendants, and Studham signed the charge sheet. Plaintiff's finger prints were taken, and he was detained in a cell for about three hours before being released on bail. On Mar. 19, 1935, plaintiff was charged with larceny at the Wealdstone Petty Sessions and was remanded on bail for seven days. On Mar. 26, 1935, plaintiff was discharged from custody and the prosecution was determined in his favour.

The jury returned a verdict for the plaintiff, and the hearing was adjourned for legal argument.

T. Eastman, K.C., and *F. C. Wynn Werninck* for the plaintiff.

J. D. Cassels, K.C., and *I. C. Baillieu* for the defendants.

Cassels: The finding of the jury that no theft had taken place was against the weight of evidence and perverse. The representative of the defendants who used the expression "I did give him in charge" and who brought the police on the scene for the purpose of investigation, did not in law arrest the plaintiff. He referred to *Grinham* v. *Willey* (2).

CHARLES, J.: In this case I am somewhat unwillingly giving judgment for the plaintiff. The jury were asked the question as to whether these vents had been stolen, *i.e.*, whether there had been any felony. They answered "No."

There was positive evidence that at this time or before, there had been a clearing-up of the overweight from this job, and the goods were shifted away, and the jury were entitled to say that they disbelieved the evidence of those two labourers and that they did believe what the other man said that he picked them up and put them under a tarpaulin. It was quite open to the jury to say with all this movement that they were not satisfied that anything was stolen.

There is another point into which the contractors had been let by the definite answer of Studham, "I did give him in charge." That answer is to me quite fatal. It is a well-known principle of law that you can have imprisonment by police and informant, that the person who has given a man in charge cannot release himself from the obligations placed upon him (*Walters* v. *W. H. Smith & Sons* (1)). That being so, the plaintiff is entitled to judgment for the sum of £175 upon the false imprisonment, with costs, save that any costs referable to malicious prosecution must be defendants' costs.

Cassels asked for a stay of execution on the usual terms until the hearing of the appeal.

Stay of execution for fourteen days granted.

Solicitors: *Pierron and Morley* (for the plaintiff); *S. B. Graham* (for the defendant).

SCHLARB *v.* LONDON & NORTH EASTERN RAILWAY CO.

[KING'S BENCH DIVISION (Atkinson, J.), **January 29, 1936.**]

Carriers—Negligence—Railway—Fall from platform—Edge marked by white lines—Fog.

On a very foggy night the plaintiff, having descended the staircase of a railway station, was proceeding cautiously forward on the platform, when she fell over the edge. It was proved that on this particular night the lighting of the station was quite ineffective at this particular point, and the construction of the station was such that the plaintiff was without any indication of which way the platform was run. The foot of the staircase was within three yards of the edge of the platform, but the latter was marked by a white line painted along it. There was no guard rail.

HELD: the defendants were negligent and there was no evidence of contributory negligence on the part of the plaintiff.

[**EDITORIAL NOTE.** Though the construction of the station in this case appears to be unusual, it would appear that there is a duty on the part of a railway company to take precautions to ensure the safety of a person using a station for the first time and unacquainted with its particular construction, and that such precautions must be sufficient to prevent accident to a person so using the station on a foggy night provided he or she uses reasonable care. The case is almost identical with *London, Tilbury and Southend Railway* v. *Paterson* (1913) 29 T.L.R. 413, but in the present case, the edge of the platform was marked out with a white painted line. The Judge held that this not being visible on the night in question, it afforded no defence.

AS TO THE DUTY OF RAILWAY COMPANIES WITH REFERENCE TO THEIR PLATFORMS, see HALSBURY, 2nd Edn., Vol. 4, p. 62, para. 95, and pp. 67-69, para. 102; DIGEST, Vol. 8, pp. 85-87. AS TO THE DUTY TO INVITEES, see HALSBURY, 1st Edn., Vol. 21, pp. 385-391, paras. 654-658, and FOR THE CASES, DIGEST, Vol. 36, pp. 35-45.]

Cases referred to:

(1) *Brackley* v. *Midland Railway Company* (1916) 85 L.J. K.B. 1596; 8 Digest 87, *598*.

(2) *Norman* v. *Great Western Railway Company* [1915] 1 K.B. 584; 38 Digest 352, *580*.

(3) *London, Tilbury and Southend Railway* v. *Paterson* (1913) 29 T.L.R. 413; 8 Digest 86, *592*.

ACTION for damages in respect of personal injuries caused by the negligence of the railway company. The plaintiff, a passenger lawfully on the platform of the defendant company's station at Clapton, upon a foggy night, fell and became jammed between the platform and a train. The plaintiff relied upon the following particulars of negligence: (*a*) failure adequately to light the platform; (*b*) failure to give sufficient or any warning of the danger. The defendants denied negligence and pleaded that the station was adequately lighted, that sufficient warning of the danger was given by the painting of a white line on the edge of the platform.

The facts are fully stated in the judgment.

Linton Thorpe, K.C., *Alban Gordon* and *A. J. F. Wrottesley* for the plaintiff.

Gerald Howard for the defendants.

Atkinson, J.: On Jan. 1, 1934, at 5.30 p.m., the plaintiff went to Clapton station to take a train to Liverpool Street station. She took a ticket and had to find her way to the platform. She had to go forward, turn to the left and make five or six right-angled turns. She had never been on the station before and therefore was unaware of its construction. The night was dark and so foggy that the bus and tram services had been suspended. At this station, the stairway leads on to the platform at right angles to the permanent way and the walls on each side of it are constructed to support other buildings, and that on the right completely blocks out any view of the platform. When an intending passenger leaves the stairway, he or she is in fact half-way across the platform, and less than three yards from its edge, without anything to indicate which way the platform is run. Counsel for the defendants mentioned that there were other stations of a similar design, but that has no value here. The evidence clearly establishes that there was no lighting of any kind at that point and that the plaintiff was some twelve feet away from the nearest electric light. She stated that she saw no light at all coming down the stairway, and I think that is true and is supported by the evidence of the police officers. One of them was a tall man and he said that you could not see anything at the bottom of the stairs. He also said that you could not see anything more than seven or eight feet from any light and the plaintiff was ten or twelve feet from the light. She was in complete darkness and cautiously advanced a few steps and before she knew where she was she had fallen on the edge of the platform and broken her leg. She screamed and shouted, but no one heard her. Hearing a train coming, she dragged herself clear of the line and against the edge of the platform. As the train drew in some part of the engine struck her, but not seriously.

Under the circumstances the plaintiff says she was placed in danger and that the defendants did nothing whatever for the safety of passengers using the stairway on a night like that. The defendants relied on *Brackley* v. *Midland Railway Company* (1) as establishing that a railway company's duty to passengers is that of invitor to invitee, and they also cited *Norman* v. *Great Western Railway Company* (2). But the case of *London, Tilbury and Southend Railway* v. *Paterson* (3) seems more applicable. The facts there were almost identical with those of the present case and the House of Lords there defined with complete clarity the duty of a railway company in such circumstances. The night was foggy and the plaintiff fell on to the platform and was injured. Lord Atkinson in his judgment says:

> A fog prevailed from about 9 o'clock over the station and the surrounding

neighbourhood, so extremely dense in character that notwithstanding the presence of the lighted lamps the platform was left in thick darkness. . . . The danger was well known to the railway officials at the station. . . . The question is what duty towards her, if any, springs out of these circumstances. In my opinion they imposed upon the company a duty towards her at the very least, to take all reasonable precautions to protect her effectively from the dangers besetting all movement and action reasonably incidental to [movement upon the platform and remaining upon it till the train should arrive].

That is the law. Did the defendants adequately perform the duty cast upon them ? They knew of the state of affairs and did nothing. They knew that passengers coming down this stairway would go on to the line. The defendants knew or ought to have known that the lighting was wholly inadequate on this particular night. No warning was given her by the person who served her with the ticket ; no warning was given by a porter, there was no curved rail to help a passenger and the stairway was half-way across the platform. There is a breach of duty. The white lines are useless in a fog and are only of use if you can see them.

The real defence is that the plaintiff was guilty of contributory negligence. In order to establish this the plaintiff must have been fully aware of the stairway and its direction and how it led half-way across the platform. LORD ATKINSON did not have to deal with contributory negligence, but that makes no difference as the plaintiff was not guilty of any negligence. She advanced slowly and with care and she had been invited on to the platform. I find that the plaintiff is entitled to succeed.

Solicitors : *A. Wood & Co.* (for the plaintiff) ; *J. B. Prichard* (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

COLLINGWOOD *v.* HOME & COLONIAL STORES, LTD.

[King's Bench Division (Greaves-Lord, J.), **January 27, 1936.**]

Nuisance—Adjoining premises—Fire caused by fault in electric lighting circuit—Damage to adjoining premises by water—No negligence.
Damages—Erection of hoarding—Interference with access to premises.

(i) In premises adjoining those of the plaintiff a fire originated, owing to some unknown defect in the electrical wiring. The plaintiff's premises were damaged by the water used for extinguishing the fire.

Held: in the absence of any proof of negligence by the defendants in the installation or the maintenance of the electrical wiring, they were not liable in damages to the plaintiff under the doctrine of *Rylands* v. *Fletcher*.

Rickards v. *Lothian* [1913] A.C. 263 applied.

(ii) For the purpose of reinstating both premises a hoarding was erected just outside plaintiff's premises, interfering with access to them. The plaintiff's trade in fact increased during that period.

Held: it was impossible to say that there was no interference with the plaintiff's trade by reason of the erection of the hoarding and damages were assessed under this head at £15, if upon appeal they should be held to be recoverable.

[EDITORIAL NOTE. The doctrine of *Rylands* v. *Fletcher* has previously been extended to damage by fire and electricity "escaping" from neighbouring premises. In the present case the damage was caused by water poured upon the plaintiff's premises in consequence of there being a fire on the defendants' premises. If the claim had succeeded, it would seem to require a further extension of the doctrine referred to.

For the Doctrine in *Rylands* v. *Fletcher*, see HALSBURY, Vol. 21, pp. 525-530, and for the Cases, see DIGEST, Vol. 36, pp. 187-199. As to Obstruction by the Hoarding, it is believed that the cases in DIGEST, Vol. 19, p. 181, Nos. 1312-1315, are the only reported cases upon the subject.]

Cases referred to:

(1) *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330; 36 Digest 187, *311.*
(2) *Rickards* v. *Lothian* [1913] A.C. 263; 36 Digest 194, *353.*
(3) *North Western Utilities, Ltd.* v. *London Guarantee and Accident Co.* [1936] A.C. 108; Digest Supp.

Action for damages for negligence and for nuisance. The facts and arguments are fully stated in the judgment.

H. D. Samuels, K.C., and *G. J. Paull* for the plaintiff.

J. G. Trapnell, K.C., and *H. G. Wilmer* for the defendants.

Greaves-Lord, J.: The plaintiff in this action is the owner of the lease of shop premises at 120, High Street, Barnet, adjoining the entrance to a cinema, which is built at the rear of such premises, and partly at the rear of certain premises owned by the defendants, the Home & Colonial Stores, Ltd., who are multiple-shop owners.

The defendants' shop was lighted by electric light from the supply provided by the local lighting authority, and the current entered the premises in the basement at the front of the premises, where the main switch was fixed. As to the subsequent course of the current, the

evidence was extremely vague, but it is certain that a line ran from the main switch to a fuse-board situated just within the warehouse, where there were switches controlling the lighting of the basement. The lighting of the basement consisted of two pendent lights suspended from roses on the ceiling of the basement, one light being suspended a few feet from the main switch and the other a very short distance from the hole in the floor through which the lift travelled and between that point and the side wall of the basement. As I have said, these lights were controlled from switches in the warehouse near to the fuse-board, and there is no satisfactory evidence of the route taken by the supply from the main switch to such lights, except that by inference it must have been more or less direct from the main switch to the fuse-board and sub-switches and then to the basement lights. Probably the light nearest the main switch formed the terminal of a line run from the sub-switch, connecting in its course with the light which was fixed between the basement wall and the lift, and then afterwards turning to the light near to the main switch.

There was a great conflict as to the method of wiring in the basement, but all that can be said with certainty is that such wiring was enclosed partly in lead cable, and there was some wooden casing, but exactly how the wire which was covered by such casing was immediately covered, it is impossible to say, although there is some ground for saying that it was partly contained in ordinary black and red twin flex, and that such wire ran first across the basement and from opposite the lift opening to the front, that is to the lamp near to the main switch. Some suggestion was made that a portable light had been fixed by connecting flex to the wire and suspending it, when not in use, to a hook or nail fixed to the beams or rafters carrying the warehouse floor or the ceiling of the basement. I am not satisfied on the evidence there was any such portable light attached. I am satisfied that the rafters of the shop ran from front to back of the shop, and not across, and so far as the wiring ran in line from back to front of the shop it ran along one of these rafters, and while so running was partly covered by wooden casing.

At mid-day, or shortly after, on June 21, it is said the switches controlling the basement lights were turned off, and if so the wires which served such lights would be dead. It would, however, be easy to have omitted the switching off of these lights in June, there being no evidence that anyone had been working in the basement near to closing time. Nothing more is known until about 7 o'clock on the morning of the 22nd, when the fire which formed the subject of this action occurred.

[His Lordship then discussed in detail the facts relating to the place of origin of the fire.]

I am driven, therefore, to the conclusion that the fire originated in the basement and was in some way connected with the electrical wiring.

This, however, does not dispose of the case, for in my view it must be proved how the fire was started, and upon this there is no proof at all. It may have been by a fusing of the wiring, but what caused the wire to fuse ? Was it a result of a faulty wiring, or of some conditions that caused a leakage of current in the basement ? I am unable to say. It is said the wiring was defective and that a warning to that effect was given in 1933. I am not satisfied that any warning relating to the basement wiring was given in 1933. I am inclined to the view that there is some confusion by reason of the fact that a warning referring to some other matter was given in 1933, but that was confined to the warehouse and had long before been remedied. No other head of negligence is suggested, and although there is some doubt as to whether the installation was in accordance with modern requirements, I cannot find the omission to bring it up to date to be negligence, in view of the fact that public authorities make no requirement to that effect. Nor is there any evidence that any skilled person found the installation defective, although on at least two occasions since 1930 the wiring was tested by the usual tests employed by experts, namely for short-circuits as between poles and for leakage anywhere in the system, and was found to be all right.

I think I ought to say this, that so far as the electrical installation is concerned, it seems to be consistent with the evidence that the cause of fire in a building wired for electric light may originate in many different ways. It may originate, for example, through a short circuit caused by rats or other rodents dividing the wire and, while dividing the wire, causing a short-circuit. It may originate by water escaping or through the perishing of rubber used as insulation over the wire, and there being a leakage of current and subsequent short-circuit caused by that damage. At any rate, I was left in a complete haze as to what had happened.

It was argued that negligence is unnecessary, and that the case comes within *Rylands* v. *Fletcher* (1), and that electricity brought on to premises implies an absolute duty to keep it in at the peril of the owner. This judgment has certainly been qualified in its application ; and certainly as to water brought on to premises in pipes, and therefore in an unnatural way, it has been held in the Privy Council that there is no liability apart from negligence. See *Rickards* v. *Lothian* (2) at page 291.

I think one should bear in mind, in dealing with the case of *Rylands* v. *Fletcher* (1) that the nuisance complained of in that case consisted of originally bringing the water on to the premises and not taking steps to see that those premises were really fit for water to be brought on in the circumstances under which the water was brought on those premises. *Rickards* v. *Lothian* (2), on the other hand, is a case where water was brought on to the premises in an unnatural way, namely, through a

water pipe, and that water leaked and destroyed or did considerable damage to the lower floors of the building. What was held by the Privy Council there was this, that you had to deal with the building as it was, and it must be pointed out that the use of water brought on to the premises in that way is not by any means an unusual user of the premises. In other words it is not only a usual method, but there is practically a duty on the owner to bring the water on, and I am afraid nowadays it would be very difficult to say that the bringing of electric light on to premises was an unusual user of those premises.

That seems to be the principle of the decision in *Rickards* v. *Lothian* (2). On page 281 I find this. There is a quotation first of all from a judgment of BLACKBURN, J., who, it must be remembered, delivered the judgment in *Fletcher* v. *Rylands* (1).

In giving judgment in favour of the defendants, BLACKBURN J., says:

> I think it is impossible to say that defendants as occupiers of the upper storey of a house were liable to the plaintiff under the circumstances found in the case. The water-closet and the supply pipe are for their convenience and use, but I cannot think there is any obligation on them at all hazards to keep the pipe from bursting or otherwise getting out of order. The cause of the overflow was the valve of the supply pipe getting out of order and the escape pipe being choked with paper, and the Judge has expressly found that there was no negligence; and the only ground taken by the plaintiff is that the plaintiff and defendants being occupiers under the same landlord, the defendants being the occupiers of the upper storey, contracted an obligation binding them in favour of the plaintiff, the occupier of the lower storey, to keep the water in at their peril. I do not agree with that; I do not think the maxim, *Sic utere tuo ut alienum non lædas* applies. Negligence is negatived; and probably, if the defendants had got notice of the state of the pipe and valve and had done nothing, there might have been ground for the argument that they were liable for the consequences; but I do not think the law casts on the defendants any such obligation as the plaintiff contends for.

Their Lordships are in entire sympathy with these views. The provision of a proper supply of water to the various parts of a house is not only reasonable, but has become, in accordance with modern sanitary views, an almost necessary feature of town life. It is recognised as being so desirable in the interests of the community that in some form or other it is usually made obligatory in civilised countries.

I frankly cannot see any real distinction between the water supply and the necessary lighting supply. My attention has been called to the case of the *North Western Utilities, Ltd.* v. *London Guarantee and Accident Co.* (3). That case refers to the accumulation of natural gas in large mains through the streets of the city of Edmonton, Alberta. Although there is a suggestion that that accumulation of gas might possibly have brought the defendants in that case within the provisions of *Fletcher* v. *Rylands* (1), the judgment in fact depends upon there being negligence in the bringing of that natural gas to those premises. I therefore cannot read that case as interfering with the clear decision of *Rickards* v.

Lothian (2). Under those circumstances my judgment here must be for the defendants.

As it may be the wish of the parties to take this matter further, I think I ought to deal in some way with the claim for damages. That claim was rather extraordinary. It appeared that first of all under the heading of damage was "damage to trade" by reason of the fact that for some time after this fire the premises were interfered with by a hoarding being built just outside them, interfering with access to the plaintiff's premises, the plaintiff being a man who carried on business as a tobacconist and a dealer in sweets. Curiously enough, although it is alleged there was damage, the trade of those premises increased during that period. Then there was a period during which the shop was closed, and of course it must be obvious that the plaintiff lost trade during the period when the shop was closed. But it is alleged, or rather it was alleged but was certainly very wisely given up by counsel during the hearing of the case, that the plaintiff had lost some goodwill by reason of the premises being closed, and by reason of the access to the shop being interfered with. As rather indicating what the condition of affairs was with regard to the claim for goodwill, it must be pointed out that from the moment the premises were reopened the trade still further increased; in fact there never was a time after this time when for any considerable period the trade of the premises depreciated. It is therefore very difficult to see how exactly the claim for damages to goodwill could be admitted. It is also rather difficult to see how it could be seriously alleged that there was much interference with the trade of the shop during the period when the hoarding was erected. I suppose it is almost impossible to say there was none, and probably during the period when the hoarding was in front of the shop or near the front of the shop the trade may have beer interfered with. Certainly it would be going very far, at a guess, if one said that that interference amounted to more than about £15 worth of trade.

During the time that the shop was closed, of course, there must have been interference. There has not been any serious criticism of the amount for damage to goods. I think if he is allowed £75 in respect of that item there would be sufficient; if he is allowed £15 for loss of profit during the time that the premises were interfered with by the hoarding he would be amply compensated; and if for the period that the shop was closed he is allowed another £100, I think he has got absolutely full compensation for any loss he may have sustained. With regard to the claim for loss of goodwill I dismiss that altogether. There would be the amounts of £7 15*s*. 0*d*. and £6 5*s*. 0*d*. for cost of storage room and for removal of goods respectively.

Therefore, if I were minded to give judgment for the plaintiff at all, it would be for the sum arrived at by the addition of those figures. But,

as I have already said, I do not think the plaintiff here has proved his case, and in those circumstances there is judgment for the defendants with costs.

Solicitors: *Lucien Fior* (for the plaintiff); *William Hurd & Son* (for the defendants).

[*Reported by* HAROLD PARRISH, ESQ., *Barrister-at-Law.*]

Re GOZZETT, *Ex parte* MESSENGER & CO., LTD., *v.* THE TRUSTEE.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.)
January 31, 1936.]

Bankruptcy—Duty of trustee as officer of the Court—Agreement for loan intended to pay particular creditor—Execution of improvement by creditor on land of bankrupt—Land sold at enhanced price by reason of improvements—Claim by creditor to be paid out of purchase money.

G. contracted with M. & Co. that they should build upon his land four greenhouses at a price of approximately £1,100, with the proviso that he was not to be bound by such contract unless he obtained a loan sufficient to meet his obligation under the contract. M. & Co. introduced G. to the Agricultural Mortgage Corporation, and a sufficient loan by the Corporation to G. was arranged.

The work having been carried out to the satisfaction of all parties, M. & Co. wrote to the Corporation requesting payment by them of the £1,153 14*s.*, and the Corporation expressed their willingness to pay M. & Co. upon receipt of G.'s permission. M. & Co. sent a form of permission to G. for his signature, but on the very day of its arrival a receiving order was made against G. The trustee in G.'s bankruptcy was able to sell the land at an enhanced price by virtue of the presence on it of the four greenhouses.

M. & Co. then sought to restrain the trustee from dividing £1,153 14*s.*, part of the proceeds of sale of the said land among the creditors generally and claimed the said sum for themselves in full.

HELD: as M. & Co. at the date of the receiving order had no right to receive the loan from the Corporation without the consent of G., the said sum was divisible between the general creditors. The facts did not warrant the application of the doctrine of *Re Condon, Ex p. James* (1874) 9 Ch. App. 609, as M. & Co. by their own failure to obtain a charge to secure their debt were in the position of unsecured creditors.

[**EDITORIAL NOTE.** The "rule in *Ex p. James*" is generally stated in terms that restrict the "ameliorative jurisdiction" of the court to cases where the trustee in bankruptcy would be taking advantage of a mistake. It is here defined as the application of "equity not in the legal meaning, but rather in the sense of natural justice." The present case clearly shows that the court will not extend the doctrine to a case where there is no mistake and the difficulties of the creditor arise from the fact that he failed to take proper legal precautions to secure himself in the event of debtor's bankruptcy.

For the Doctrine in Question, see HALSBURY, 2nd Edn., Vol. 2, p. 164, and for the Cases thereon, see DIGEST, Vol. 4, pp. 205, 206, Nos. 1889-1896.]

Cases referred to :

(1) *Re Condon, Ex p. James* (1874) 9 Ch. App. 609 ; 4 Digest 205, *1889.*
(2) *Re Tyler, Ex p. Official Receiver* [1907] 1 K.B. 865 ; 4 Digest 206, *1895.*
(3) *Re Hall, Ex p. Official Receiver* [1907] 1 K.B. 875 ; 4 Digest 380, *3505.*
(4) *Re Thellusson, Ex p Abdy* [1919] 2 K.B. 735 ; 4 Digest 205, *1893.*
(5) *Re Regent Finance & Guarantee Corporation, Ltd.* [1930] W.N. 84 ; Digest Supp.
(6) *Re Leslie, Leslie* v. *French* (1883) 23 Ch. D. 552 ; 32 Digest 262, *454.*
(7) *Smith* v. *Hodson* (1791) 4 Term Rep. 211 ; 4 Digest 404, *3681.*
(8) *Dann* v. *Spurrier* (1802) 7 Ves. 231 ; 32 Digest 257, *422.*

Messenger & Co., on July 31, 1935, by a motion in the Warrington County Court asked for an order that the trustee in the bankruptcy of Gozzett should take all necessary steps to implement the provisional contract between the bankrupt and the Agricultural Mortgage Corporation, Ltd., hereinafter described for raising £1,153 14*s.* and that the trustee should be ordered to direct the said Corporation to pay that sum to Messenger & Co., and a declaration that Messenger & Co. were entitled as against the trustee to the money payable under the said provisional contract. His Honour Judge Whitmore Richards made an order in the terms of the motion and his judgment is fully reported in [1935] L.J. N.C.C.R. 341. From this decision the trustee appealed to the Divisional Court in Bankruptcy and the appeal was heard on Nov. 18, 1935, by Clauson and Luxmoore, JJ. The following judgment was delivered by Clauson, J., in which the facts are fully set out.

Clauson, J. : In the month of February, 1934, Mr. Gozzett was the owner of some land near Warrington where he apparently was carrying on the business of a nursery. The land, as I understand, is freehold ; he owned the land in freehold subject to a mortgage. He was minded to increase the number of glass-houses upon his property and he wrote to inquire of a firm of Messenger & Company, who are persons who build glass-houses, as to what steps should be taken. Messrs. Messenger replied to him in a letter of Feb. 26 in which they indicate that they can assist him to meet the position by obtaining the benefit of a loan to cover the cost of the glass-houses, subject to the approval of the Ministry of Agriculture. Some further correspondence as to the details of the houses he wanted, and so forth, took place, and Messrs. Messenger seem to have prepared an estimate for the work which he required and to have placed the estimate before him. Mr. Gozzett accepted their estimate and was prepared to become bound to pay the price against their erection of the glass-houses, but with this proviso, that he was not prepared to be bound by such contract unless he obtained a loan which would put him in funds to meet his obligations under the contract. In stating that I think I have stated exhaustively the legal position at that date

between Mr. Gozzett and Messenger & Co. Messenger & Co. proceeded then to take the necessary steps to obtain the loan. The matter is a little complicated, but I will endeavour to summarise the position as shortly as possible. Under an Act of 1864 a body, which is now the Ministry of Agriculture, may, if satisfied that certain proposed improvements are desirable improvements, create, by making a proper order, a charge upon the property in favour of the owner who executes the improvements for the sum which the improvements cost. It appears that under an Act of 1920 a Corporation has been formed called the Agricultural Mortgage Corporation, and they apparently make it a practice to supply the cash to the owner who desires to expend money on improvements, taking as security for the payment to them of that cash an assignment of the charge by virtue of the Act of 1864, and the order of the Ministry of Agriculture is created in favour of that owner upon the land. The assent of the first mortgagee to these improvements being made and his assent to this charge being placed in front of his mortgage appears to have been obtained.

There is a document of Sept. 27, 1934, made between the Agricultural Mortgage Corporation and Mr. Gozzett. It recites that he is a landowner within the meaning of the Improvement of Land Act. It recites that he is desirous of executing certain improvements by means of money to be advanced by the Corporation and is desirous that the moneys to be advanced by the Corporation with costs and so forth shall be charged in accordance with the provisions of the said Act on all of the said lands as the Minister approves. Clause 1 provides: "These presents are intended to be a provisional contract only until the said improvements shall have been sanctioned according to the said Acts," that is to say, by the Minister, "but shall when and so far as such improvements are so sanctioned be an absolute contract." Clause 2 provides: "If these presents become an absolute contract the landowner shall forthwith assign to the Corporation by way of security for the amount to be advanced and/or expended by the Corporation in pursuance hereof the title of the landowner to any absolute charge to which the landowner may become entitled in respect of the said improvements or such part of them as shall be sanctioned by the Minister." Clause 3 provides that the landowner is to execute the agreements. It provides that from time to time in the course of construction the Corporation shall make advances upon a certificate that the works are being properly carried out, and so forth. Clause 7 provides: "Upon the Minister making any absolute order charging the said lands as aforesaid the landowner will (unless such absolute order shall be made in favour of the Corporation) forthwith at his own expense transfer the same to the Corporation and upon such charge being duly vested in the Corporation the Corporation hereby engage to pay to the landowner

his heirs executors administrators or assigns the principal moneys expended by him in the execution of the said improvements." On Sept. 28 the Minister by the proper officer signed a document which is described as a provisional order, and that order sanctions the proposed improvements, referring to them, to be executed at an expense not exceeding £1,153 14*s*., and orders " that it is right and proper, and for the benefit of the parties interested in the lands mentioned " that the fee simple shall be charged in favour of Mr. Gozzett with the £1,153 14*s*., costs and so on, and the same shall be charged " in manner following— by way of annuity payable by equal half-yearly payments for the period of twenty years charged upon the fee simple of the lands." Endorsed upon that order is a document which oddly enough is dated a day before the order, but that is no doubt a mere slip, and no doubt of no importance. It is in these terms, reading it shortly: I Herbert Gozzett in pursuance of the provisions of the Act of 1864 and in consideration of the Mortgage Corporation having entered into a contract with me dated Sept. 27 to provide moneys necessary to carry out the within sanctioned improvements in accordance with the provisions of the said contract assign to the Corporation absolutely my title to an absolute charge conferred upon me by virtue of sect. 27 of the Act by the within order on the completion of the improvements within sanctioned.

Let me pause there for a moment to consider what the legal position was as between Gozzett, Messrs. Messenger and the Corporation. I think it is reasonably clear that the condition upon which Mr. Gozzett had accepted Messenger's estimate as expressed in his letter of April 16 had been fulfilled, and that as between Gozzett and Messenger there was a contract that Gozzett should pay the price according to the estimate for the proposed works and that Messenger should put up the proposed works. The position, further, was this, that as between Gozzett and the Corporation the Corporation had bound themselves to advance the required funds to Gozzett, and Gozzett had bound himself to take the money in question from the Corporation upon the terms of the Corporation standing in Gozzett's shoes as a chargee upon the land. I cannot in the documents that I have stated see any trace at all of any charge being created in favour of Messenger by Gozzett either upon his own land or upon the charge to which he would be entitled if money was spent on improvements, or upon the money which he would upon the terms of the contract with the Corporation have been entitled to call upon the Corporation to advance to him. I see no trace of it. It would appear to me that the position at that moment was this: Messengers, these arrangements having been made, and made mainly, as I understand it, for their interest, as men of business knew that Gozzett's finance was arranged, if I may so express it, and they were prepared to go on and execute the order on the terms of the

contract they had entered into with Gozzett under which he was bound to pay them when they completed the work. I do not suppose it occurred to them there was the possibility of Gozzett ever going bankrupt. If they had thought of it at all and had wanted to secure themselves, nothing would have been easier than to get a document, which could have been in the most informal terms, under which Gozzett should create a charge to secure the cost of the improvements either on the land, or, as I have said, on his rights—I put it in general terms—as between Messengers and the Corporation. Nothing of the sort was done. As has often been the case, and as always will be the case in connection with ordinary business transactions, Messengers regarded Gozzett as a person with whom it was desirable to have dealings, and they did not see their way to bother him by asking him to create any charge, or take any step of that kind. The fact remains that at the date at which we have arrived in my mind, Messengers had no charge of any sort upon anything at all. However, Messengers proceeded to do the work, and, having done the work, they were in my view entitled to call upon Mr. Gozzett to pay the £1,150 odd. On Jan. 10 they reported to the Corporation that they had completed the contract for Mr. Gozzett, and they say, "We shall be glad if you will advise us that he may authorise us to obtain payment direct from you, or if we should submit our account to him for payment after he has received this from you. We would prefer to receive payment direct from you if possible." To that the Corporation reply that they have requested the Ministry to make the final inspection of the work, and "as soon as we are advised the Ministry are prepared to issue the absolute order, we will make arrangements for the completion of the loan. We should have no objection to paying your account ourselves out of the completion moneys, provided that the applicant has no objection to our doing so. We will, however, communicate with you again after the Ministry has given its final certificate with regard to the cost of the work." Let me just pause there. That puts the position in my view perfectly properly, and is entirely in accord with my view of the legal position as it stood. The Corporation were going to advance the money to Gozzett as soon as the absolute order had been made, that is to say, as soon as the Ministry had taken the formal step required to record that they were satisfied with the improvements and definitely to charge the land with the sum which the Corporation were going to advance, that charge being, of course, the security to the Corporation for what they were advancing. But the money which the Corporation advanced was to be advanced to Gozzett, and they quite rightly pointed out that they cannot pay Gozzett's liabilities to Messengers out of that money without an order from Gozzett so to do. Of course, if the fact had been, or if anybody had supposed that the fact had been, that those moneys were subject

to an equitable right in Messengers to have them applied in the first instance between them and Gozzett, whether Gozzett liked it or not, in discharge of their bill, nothing would have been easier than for them to reply, "Why should you pay to Mr. Gozzett? We have a charge on this property." In my view of the law they had no charge of any sort at the time, nor for a moment do I suppose it crossed their mind that they had such a charge. The inspection, I suppose, in due course was made, and a letter was written on March 7, apparently by Messengers to the Corporation, I suppose asking for payment. We have not that letter, but the answer to it shows sufficiently what it is. It is headed "Application of H. Gozzett for an Improvement Loan," and the Corporation say to Messengers, "In order to regularise the position will you kindly let us have the applicant's written consent to our paying your account out of the completion money?" Messengers accordingly on March 11 write to Mr. Gozzett and say, "We have not yet received payment from the Agricultural Mortgage Corporation, Ltd., in respect of the glasshouses recently erected, but we have received a letter from them requesting us to forward a further account, and they have also asked us to let them have your written consent for payment. We shall therefore be much obliged if you will kindly give your signature to the form enclosed herewith and return same to us at your earliest convenience." Unfortunately on that same day, March 11, a receiving order was made against Mr. Gozzett, and Mr. Gozzett became bankrupt. No signature by Mr. Gozzett would be of any value, and naturally the trustee in bankruptcy was not prepared to sign in Gozzett's place because that would have the effect of ordering the Corporation to pay certain moneys to Messengers, and the result of that would be that Messengers, persons who had in my view been executing an order for the glasshouses upon the unsecured credit of Mr. Gozzett, would get priority to the general creditors. As a matter of fact, what has happened since is this. It turned out that there was opportunity for selling the property to advantage, and by a very reasonable arrangement the property was sold by the trustee in bankruptcy and fetched enough to pay off the first mortgage, and, as I understand, also to provide, although not in full, the figure which could provide payment of the £1,153 for Messengers. That has been done by arrangement; it does not affect the rights of the parties in the very least. The rights of the parties, in my view, turn upon this. What is the answer to this question? Before the bankruptcy, and assuming that bankruptcy had not come about, could Messengers have insisted on the Corporation paying to them otherwise than with Gozzett's consent, or, shall I say, against Gozzett's demand, the £1,153, the amount of the cost of the improvements? On the facts as I see them there cannot possibly be any but one answer to that question. It is quite plain that Messengers had no

equitable right or charge of any sort, and it becomes all the plainer when one considers how very easily they could have got a charge if they had only taken the ordinary business precautions which a business man should take who wants to get a charge. In my view the matter stands there, and the question is what the strict rights are in law and equity in regard to these matters. In my view Messengers must be treated as unsecured creditors, and accordingly this balance of purchase money will not go to them. It will go into the general assets and they will have the ordinary right of an unsecured creditor.

It is said, however, that we ought to apply what is commonly called in this Court the doctrine of *Ex p. James* (1). It is said here the sum of £1,153 has come into the hands of the trustee in bankruptcy. It is a sum which ought to have gone to Messengers. Unless it does go to Messengers the creditors in the bankruptcy will have the advantage of having the benefit of the purchase money, assets of an important property. Well, the improvements have been paid for, but Messengers are only going to get a dividend. That type of hardship is one which in my view gives no opportunity to the Court to exercise the jurisdiction which is sometimes beneficently exercised by the Court to make a trustee in bankruptcy deliver up to a person, who is in all fairness entitled to it, property or money which has come into his hands in the course of bankruptcy. What we are really being asked to do is this: we are being told this is a case in which Messengers, had they been alive or thought about it for a moment, could have got a security, and they did the work on the footing that they were dealing with a man who when the time came would have been able to pay them because his funds would have been implemented by a loan which he had been able to obtain. They did the work on the security of his getting that money, and now they ought to be treated as having a charge on the money. The real truth of the thing is they did the work on the footing that they were giving credit to a man to whom they thought it reasonable to give credit, because they had every anticipation that by the time their bill had to be paid he would have been put in funds to pay it. That does not seem to me to afford any justification for putting them into the same position as if they had done that which they could very well have done if they had been careful, and that is to put them into the position of a person with a security, a position in which they could very easily have put themselves and never in fact did.

Under those circumstances, in my view, Messengers have no position but that of an unsecured creditor. The learned Judge in the Court below persuaded himself as I read his judgment that there was some ground for suggesting that Messengers had an equitable security. With great respect to his judgment I have been unable to find any ground upon which any such adventitious equitable claim of Messengers could be

established on the facts which I have attempted to state, and I think I have succeeded in stating them exhaustively as far as they are relevant. The learned Judge also seems to have taken the view that it was a case in which it would be reasonable, if necessary, to take advantage of the *Re Condon, Ex p. James* (1) doctrine. I can only say, for the reasons I have given, that it seems quite out of the question to act under that doctrine. Accordingly, in my view, the order we must make is to discharge the order of the learned Judge below and dismiss Messrs. Messengers' motion, and order Messengers to pay the costs below and of this appeal.

Luxmoore, J.: I agree and have nothing to add.

From this judgment Messenger & Co., with leave of the Divisional Court, appealed to the Court of Appeal.

Tindale Davis and *A. Anderson* for the appellants. As the fund was specifically created for the provision of the greenhouses it would not be just that the appellants should remain unpaid. Gozzett could not have disbursed this money for any other purpose than payment of this debt. The scheme for such payment was carried out in a special way with the assent of the Ministry of Agriculture. It is unfair for the trustee to sell the greenhouses for the benefit of creditors. It is clear that Messenger & Co. would never have undertaken this work unless they were satisfied that the fund was specifically created for their guarantee. The scheme must be considered as a whole, and it creates an equitable charge in favour of the appellants. [He referred to *Re Condon, Ex p. James* (1); *Re Thellusson, Ex p. Abdy* (4); *Re Tyler, Ex p. Official Receiver* (2); *Re Hall, Ex p. Official Receiver* (3); *Re Regent Finance & Guarantee Corpn., Ltd.* (5); *Re Leslie, Leslie* v. *French* (6).]

Anderson (following on the same side): The trustee must either affirm or disaffirm and must accept the whole situation as he finds it or reject the whole (*Smith* v. *Hodson* (7)). The appellants had an equitable lien on the land and greenhouses and Gozzett did more than stand by while the appellants spent the money (*Dann* v. *Spurrier* (8)). The documents form a tripartite agreement.

W. N. Stable, K.C., and *Allan Walmsley*, for the respondents, were not called upon to argue.

Lord Wright, M.R.: This is an appeal from the Divisional Court as to whether certain moneys in the hands of the trustee should be paid to the appellants. In my opinion they are not secured creditors and have no equitable charge of any kind. It is said, however, that they should be paid on the principle laid down in *Re Condon, Ex p. James* (1) and one or two other cases. From these cases it is difficult to derive and explain any specific principle at all. What has to be applied is equity not in the legal meaning, but rather in the sense of natural justice. It is always difficult to go beyond the rules of law and equity and may lead to unfairness. I shall state shortly the facts of this

case and then see if they can be brought within the facts of those other cases where the Court has been able to exercise its ameliorative jurisdiction. The debtor carried on the business of a nurseryman and was a freeholder. In February, 1934, he wanted to build some greenhouses for which it was necessary for him to have financial help. He applied under the Improvement of Land Act, 1864, which provides facilities for the improvement of land, the jurisdiction being exercised by the Ministry of Agriculture and Fisheries. The procedure is that a provisional order is granted on certain terms The order sanctions specific improvements and authorises a charge on land in favour of an approved corporation to advance the necessary loan to the landowner. The provisional order is not granted until the specifications are approved by an officer of the Ministry. When the work has been completed the provisional order is replaced by an absolute order and the charge becomes effective. It then follows in the ordinary way that the contractor who has executed the improvements would be paid.

In the present case the Agricultural Mortgage Corporation provided the money. The work was duly specified and the provisional order made charging the fee simple in favour of the debtor. On Sept. 28, 1934, the debtor executed an assignment of this charge to the Agricultural Mortgage Corporation. The work was finished in January, 1935, by Messenger & Co., the appellants. They had, in fact, throughout conducted the transaction as the agent of the debtor whom they described as their client. Early in 1935 the question of the payment of Messenger & Co. had arisen, and in February the Corporation wrote to Messengers saying they would have no objection to paying them if Gozzett consented. In a second letter they asked Messengers for the written consent of Gozzett. Accordingly Messengers sent a form to the debtor for him to sign, authorising payment to be made direct to them. This was in fact never signed because on that very date, March 11, a receiving order was made.

The absolute order had never been made by the Ministry though they were prepared to make it. The money had never been paid by the Corporation. Messengers were therefore in the position of unsecured creditors. It is perfectly true the value of the land had been enhanced by the work that Messengers had done. That was the position when the trustee entered on his duties.

At a later day it was found desirable to sell the land; and it was agreed between the parties that this should be done without prejudice to their legal rights.

Now to consider the extent of this especially beneficient jurisdiction of the Court. *Re Condon, Ex p. James* (1) was a case where money was paid under a mistake of law and the Court there did not go beyond the ordinary rules of equity; but in *Re Tyler, Ex p. Official Receiver*

(2) the Court did go beyond this and considered itself bound to act upon principles less well defined. [His Lordship read the facts and judgments of *Re Tyler, Ex p. Official Receiver* (2).] This was rather a new ground—that the trustee had been standing by, allowing these payments to be made without any intimation that there would be no recovery allowed. The Lord Justice there puts the case of the money not being paid as a dirty trick. Contrast with this *Re Hall, Ex p. Official Receiver* (3) where the Court held, distinguishing the previous case, that they must abide by the ordinary principles of law. In the case of *Re Thellusson, Ex p. Abdy* (4) the debtor received £900 from a friend as a loan when neither knew of the receiving order. The money so lent went into the banking account of the debtor. It was held that the lender was entitled to recover as much of this money as remained. This is very analagous to a payment under mistake of fact, therefore it is not a matter of astonishment that the Court held that the principle of *Re Condon, Ex p. James* (1) should apply.

None of these cases seem in any way on the lines of the case before us. Here Messengers were simply unsecured creditors and their position was due to their failure to take the precaution of securing any sort of charge on the property. The estate of the debtor has been enriched by work done on credit, and the person who has done it in this case is simply in the position of an ordinary creditor. I see no reason to apply the rules of *Re Condon, Ex p. James* (1).

Romer, L.J.: *Re Condon, Ex p. James* (1) is applicable only when an officer of the Court if he acted in strict accordance with his legal rights would be doing something dishonourable. If the trustee chose to use the money advanced by the Corporation to pay other creditors, he would have been doing nothing dishonourable. Neither the Ministry nor the Corporation had any concern with the question whether the bankrupt paid Messengers or not. Nor would it have been in any way dishonourable for the bankrupt to have devoted the money received from the Corporation to the payment of his creditors generally.

Greene, L.J.: I agree, and have nothing to add.

Appeal dismissed with costs.

Solicitors: *Richardson, Sadler & Co.*, agents for *C. W. & F. H. Toone*, Loughborough (for the appellants); *Hamlins, Grammer & Hamlin*, agents for *R. G. Dell*, Manchester (for the respondents).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

BELLOTTI *v.* CHEQUERS DEVELOPMENTS, LTD.

[KING'S BENCH DIVISION (Hilbery, J.), **February 3, 4, 1936.**]

Misrepresentation—Fraud—Material misrepresentation—Dimensions of garden —Rescission—National Conditions of Sale, clause 10*—Costs.*

The plaintiff entered into negotiations with the defendants for the purchase of a house to be built upon a building estate. He made particular enquiries as to the size of the back garden, stating he wished to erect a garage thereon. The defendants wrote to him that the length of the garden was 40 feet "approximately," but in fact, it was only 36 feet, and upon this footing the usual contract was entered into incorporating the National Conditions of Sale.

HELD: (i) this was an innocent material misrepresentation which had induced the plaintiff to enter into the contract.

(ii) this was not an error, misstatement or omission within the National Conditions of Sale, clause 10 hereinafter set out.

(iii) the plaintiff was entitled to rescind the contract and the return of the deposit.

(iv) the plaintiff having alleged fraud which had not been proved, the judgment for him would be with the general costs of the action except so far as those costs had been increased by the allegation of fraud.

[**EDITORIAL NOTE.** The interest in this case lies mostly in the fact that the special clauses in general use to safeguard vendors in these circumstances seem to have failed to cover the particular facts of this case. Dimensions usually appear in the "particulars, plan or conditions" but here, as the estate had not been pegged out, and the purchaser was very persistent in ascertaining the precise measurements of the garden, the vendors were induced to write a letter setting out the dimensions "approximately." This representation was held to be outside the ambit of the clause in the National Conditions of Sale, and it may be that the usual common form conditions will need reconsideration in the case of building estates.

AS TO ERROR AND MISDESCRIPTION IN A CONTRACT FOR SALE OF LAND, see HALSBURY, Vol. 25, pp. 328-332, and FOR THE CASES, see DIGEST, Vol. 40, pp. 103-105, Nos. 812-824, p. 107, Nos. 849, 850.]

Cases referred to:

(1) *Heilbut, Symons & Co.* v. *Buckleton* [1913], A.C. 30; 35 Digest 54, *486.*

(2) *Redgrave* v. *Hurd* (1881) 20 Ch.D 1; 40 Digest 359, *3035.*

(3) *Charles Hunt, Ltd.* v. *Palmer* [1931], 2 Ch. 287; Digest Supp.

ACTION for rescission of agreement for the sale of land, return of deposit, damages for fraudulent misrepresentation.

The pleadings and arguments are fully stated in the judgment.

W. Russell for the plaintiff.

C. Gallop for the defendants.

HILBERY, J.: The plaintiff asks for the rescission of an agreement in writing for the sale of a leasehold plot and asks for the return of £45 paid as a deposit. The plaintiff also asks for damages for fraudulent misrepresentation and breach of warranty. The claim arises in these circumstances.

On Saturday, Jan. 19, 1935, Mr. Bellotti read in a newspaper an

advertisement inserted by Peter Dean, Limited, agents for the defendants of "House at Palmer's Green" and, which on the face of it, after stating the attractive amenities of the houses, gave the address of Peter Dean, Limited. Mr. Bellotti, with his wife and son, went to the office of Peter Dean, Limited, and on Sunday, Jan. 19, 1935 they were taken from the office to the building estate on which was situated the site eventually to become the subject matter of the contract under consideration.

On the building estate was a "show" house, and the plaintiff, his wife and son went over it. On the way back from the "show" house a plot marked on the plan as No. 90 was pointed out on the corner of the roadway of the estate called Pasteur Gardens and a side road called Stewartly Close, which according to the lay-out of the plan was to be a short cul-de-sac. The back garden of plot 90 would, according to plan, run along the supposed frontage of Stewartly Close.

Mr. Bellotti, with his wife and son, went back to the office of Peter Dean, Limited, and with a Mr. Freeman discussed the plaintiff's requirements. It is common ground that the plaintiff, when plot 90, as a corner plot, was being discussed, enquired, and especially enquired, for the dimensions of the back garden. Mr. Bellotti said to him, after seeing the show house and while in the office, that he would want space for a garage and desired as much garden as possible.

Mr. Bellotti says that Mr. Freeman advised him to purchase a corner site which would give him an extra piece of ground for a garage, and plot 90 was suggested as the most suitable. Mr. Freeman gave to Mr. Bellotti the measurements of the back garden, not only the frontage. The plaintiff is telling the truth when he says that Mr. Freeman advised him to take the corner plot. The corner plot was a little more money, however. When the plaintiff asked for the dimensions of the back garden, Mr. Freeman, in perfect good faith, took a ruler and endeavoured, on the large lay-out plan of the estate, to ascertain what would be the measurement of the back garden. This was difficult, because the house designed for plot 90 would have its back wall running from west to east, with a break in it half-way across the back garden, making a difference in measurement between the east and west sides.

Mr. Freeman said the dimensions of the back garden would be approximately 40 feet by 30 feet. All the circumstances lead me to believe that the word "approximately" was used, and the plaintiff is wrong in saying that it was not used.

The estate was not pegged out, only laid out on a plan, therefore some qualifying word as to measurements would actually have to be used in such a case. I any case a measurement on a small-scale plan would necessitate the use of some word qualifying the measurement. I find that when the plaintiff wrote on Jan. 31, saying "I have not received particulars of sizes and frontages of plot 90," that Peter Dean, Limited,

replied, saying " the frontage is 26 feet by 27 feet, and the rear garden measurements are 30 feet by 40 feet, the sizes being standard."

After the receipt of this letter and particulars enclosed, the plaintiff had on Jan. 19 paid £1 to the defendants as part deposit on the purchase of plot 90, and on Jan. 22 had paid £5 as part deposit. The plaintiff then arranged with the Building Society to complete the purchase. On Feb. 14 the plaintiff paid a further £40 as deposit in respect of plot 90.

On Mar. 28 the plaintiff entered into a printed contract under which the vendor undertook to sell and the purchaser agreed to purchase a leasehold house on plot 90. No further particulars were given in the contract. The contract embodied the National Conditions of Sale, clause 10 of which reads :

> No error, misstatement or omission in the particulars, sale plan or conditions shall annul the sale, nor (save where the error, statement or omission relates to a matter materially affecting the description or value of the property) shall any compensation be allowed either by the vendor or purchaser in respect thereof.

and condition 20, which reads :

> If the purchaser shall neglect or fail to comply with his purchase according to these conditions his deposit shall thereupon be forfeited

By clause 3 of the agreement the purchase price of the house was £684, of which sum £5 is to be paid to the vendor as deposit and £41 12s. 0d. paid to the vendor on the signing of the agreement.

The matter did not progress in the way the plaintiff had hoped. Great delay was shown in the building of the house upon the plot. Possession was promised at the end of April. By Mar. 18 there was nothing done on the plot by way of beginning the building of the house. By Apr. 9, there was still nothing done. The plaintiff complained that " not a brick had been laid " and he was getting impatient. The plaintiff then demanded possession of the house or the return of the deposit, and eventually, after some acrimonious correspondence, he was promised that the house would be finished in every respect on July 22, but that the defendants could not guarantee possession until July 27. This promise was made by the defendants on July 15. On July 17 plaintiff went with his son to the building estate and watched progress. The erection of the fences outlining the boundaries had just begun, and the plaintiff noticed that the rear garden appeared to be very short ; so he went at once down to the office and complained. He saw Mr. Freeman, who said he was sorry and sent two men back with Mr. Bellotti. Defendants' architect measured the plot, and found it 3 feet short. This measurement is not correct. It is now plain upon the evidence, and I find it as a fact, that the rear garden is at the longest 36 feet, and of course, on the west side, it is shorter. Mr. Bellotti has said that the reason for the shortage was because, as he was told, another house was to be squeezed in. I

am satisfied that no such statement was made to Mr. Bellotti. This is obvious when one looks at the houses as plotted on the plan.

In those circumstances, on July 17, Mr. Bellotti was obviously very angry and very discomfited. Letters passed, and eventually, on Aug. 2, Mr. Bellotti's solicitors wrote to the defendants pointing out the discrepancies in size and asking for the return of the deposit. On Aug. 12 the defendants' solicitors replied that measurements were given "approximately." The plaintiff adhered to his refusal to go on owing to the discrepancies in dimensions given to him by Mr. Freeman, saying that this was a material difference and that he had always made it plain that he wanted the amenities of a garage and rear garden. The plaintiff then brought an action for rescission by a writ dated Sept. 11, 1935.

It is clear that from the earliest moment when the plaintiff discovered the difference in dimensions that he took up the attitude of requiring the contract to be rescinded and the deposit returned. The plaintiff puts his claim in different ways. First that the statement by Mr. Freeman that the rear garden should be 40 feet by 30 feet was made fraudulently. To that the defendants say, "Mr. Freeman said it was approximately 40 feet by 30 feet, believing it, and it is." In effect that it is true approximately. I am satisfied that Mr. Freeman made his statement honestly believing that the measurement was 30 feet by 40 feet. This disposes of the charge of fraud. The statement was certainly not accurate—it was inaccurate, and I find myself unable to say that when a measurement of a rear garden is made to a purchaser asking for particulars, i.e., footage details, it is true if you only give him 36 feet when the stated measurement is 40 feet. I cannot believe that 36 feet is approximately 40 feet. I can understand 36 feet being approximately 35 feet.

In considering whether the statements of dimensions are material, it is important to observe that the garden was to be very small. In such a case, every foot in length would make a material difference to a purchaser. It is quite clear that the representation as to the size being 30 feet by 40 feet was made. The plaintiff then says that there was an agreement that he should have a garden 30 feet by 40 feet, and, if he would enter into a contract they, the defendants, would undertake that the garden would be of those dimensions. I think there was no intention to make a false representation. It was pointed out in *Heilbut, Symons & Co.* v. *Buckleton* (1) that the Court ought to scrutinise very carefully the intention of the parties. The plaintiff says that there was a verbal warranty collateral to the written contract. I am quite satisfied that there was no warranty collateral to the written contract, nor that there was intended to be a warranty collateral to the written contract.

The test is whether the parties intended this to be a warranty. The

plaintiff says: "Supposing there was no fraud, nor a verbal contract, part of the consideration of which was further contained in writing, nor any warranty, still I am entitled to equitable relief for rescission because there was a material misrepresentation calculated to induce me to enter into the contract, and it was one of the things which did induce me to enter into the contract." The plaintiff says that this material misrepresentation, turning out, as it did, to be false although innocent, entitles him to rescission of the contract.

I shall consider first whether the representation was made. Except for the word "approximately," the dimensions of the rear garden were given as 40 feet by 30 feet. I therefore find that the representation that the rear garden in plot 90 as being 40 feet by 30 feet, was in the particular circumstances of this case, a material representation. It is clear that the plaintiff asked specifically what the dimensions of the rear garden would be. By his letter he asked particularly for the measurement of the garden.

If there was a representation made and it was material, then was it misrepresented. That is undeniable unless the word "approximately" is sufficiently wide to make it necessary for me to say that 36 feet is approximately 40 feet. I cannot say this. It was a material representation and a material misrepresentation. The defendants must have known by the manner in which the plaintiff made inquiries that it was one of the matters likely to be material to induce the plaintiff to enter the contract. I think as a fact that it did operate on the plaintiff's mind as one of the inducements to enter into the contract.

In *Redgrave* v. *Hurd* (2), at page 21, JESSEL, M.R. said:

> If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or showed clearly by his conduct, that he did not rely on the representation. If you tell a man "you may enter into a partnership with me, my business is bringing in between £300 and £400 a year," the man who makes that representation must know that it is a material inducement to the other to enter into the partnership, and you cannot investigate as to whether it was more or less probable that the inducement would operate on the mind of the party to whom the representation was made. When you have neither evidence that he knew facts to show that the statement was untrue, or that he said or did anything to show that he did not actually rely upon the statement, the inference remains that he did so rely, and the statement, being a material statement, its being untrue is a sufficient ground for rescinding the contract.

I think the plaintiff's case here is stronger than that.

The plaintiff did actually rely on this statement amongst the others. I think it is more than a matter of legal inference. I think there was an innocent misrepresentation which gave the plaintiff every right to

rescission. The defendants refused to rescind. Before the end of September, 1935, the defendants sold the house again at the same price that it had been sold to the plaintiff. Now the defendants say that the representation so made was not an untrue representation because approximately 40 feet would satisfy 36 feet. On this I am against them. I think the representation was material to this contract.

The defendants further say that this was an error of description in the particulars and they rely on the National Conditions of Sale, clause 10. In the first place I do not think that this provision in clause 10 has any application to an innocent misrepresentation made before the contract comes into existence. I think that those words must be construed as applicable to an "error, misstatement or omission in the particulars, sale plan or conditions" in the contract. This conclusion is not altered by the fact that after the verbal representation was made, it was repeated in a letter in which were enclosed the particulars.

There is nothing in the printed form of the contract or the National Conditions of Sale referring to particulars which in any way correspouds to the particulars given by the defendants to the plaintiff in the letter of Feb. 1. I do not see how the particulars of measurement contained in that letter could become the particulars referred to in the contract and in clause 10 of the National Conditions of Sale. If clause 10 did apply, though it is not necessary for me to decide it, I would apply the equitable doctrine expressed in *Charles Hunt, Ltd.*, v. *Palmer* (3), having held that this was a material mis-description in the circumstances. I would not allow the fact that the market value of the property had not been affected by the misdescription alone to determine whether the property was the same thing as that which was represented.

I should have to look at all the circumstances, bearing in mind the evidence and that the misrepresentation might affect one purchaser and not another; that the plaintiff had made particular reference to the rear garden and that on a space already defined upon a plan there is a material difference in dimensions in the space actually allowed for the erection of a garage. If this suit had been one for specific performance specific performance would not have been decreed.

Upon the question of costs, I cannot see that the issue of fraud is separate from the other issues in the case. I therefore give judgment for the plaintiff for rescission and the return of the deposit and the general costs of the action, except in so far as the Master finds the costs have been increased by the addition of the allegation of fraud.

Solicitors: *Lewis and Co.* (for the plaintiff); *Lazarus, Son & L. A. Hart* (for the defendants).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

HODGSON *v.* SALT.

[CHANCERY DIVISION (Clauson, J.), **January 31, 1936.**]

Limitation of actions—First and second mortgages vested in trustees—One common trustee—Receipt of rents for more than statutory period—Application by common trustee for benefit of first mortgagees in possession—Same hand to pay and receive.

The first and second mortgages upon certain property each became vested in two trustees. In each case H. was one of the trustees, and the first mortgagees having gone into possession, H., by common consent, received the rents of the property and applied them in payment of the interest on the first mortgage and the surplus rents in reduction of the capital of that mortgage over a period of 24 years. It was admitted there was no acknowledgment. The first mortgagees then sold the property for a sum greater than the principal of their mortgage remaining unpaid. They sold and also claimed to retain the proceeds of sale as absolute owners. The second mortgagees claimed an account of the proceeds of sale and that they were entitled to the surplus after all moneys properly due to the first mortgagees had been paid.

HELD: the hand to pay and to receive being the same, the Statute of Limitations did not run in favour of the first mortgagees and the second mortgagees were entitled to the account claimed.

[**EDITORIAL NOTE.** The principle here applied that time does not run so long as the hand to pay is the same as the hand to receive has often been applied as between mortgagor and motgagee, but it would seem that this is the first occasion on which it has been applied as between different mortgagees. It is to be noticed that in this case both first and second mortgages were vested in two trustees, but "H." was one of the trustees in each instance. There seems to be no difficulty in regarding him as the agent of both sets of trustees, as he appears to have been the "active" trustee in each trust.

FOR APPLICATION OF THE PRINCIPLE AS BETWEEN MORTGAGOR AND MORTGAGEE see HALSBURY, 1st Edn., Vol. 19, p. 150, and FOR CASES, see DIGEST, Vol. 32, p. 415, Nos. 929-932, p. 472, Nos. 1357, 1358; pp. 477, 478, Nos. 1406-1411.]

Cases referred to:

(1) *Hyde* v. *Dallaway* (1843) 2 Hare 528; 32 Digest 478, *1410.*

(2) *Wynne* v. *Styan* (1847) 2 Ph. 303; 32 Digest 472, *1358.*

(3) *Topham* v. *Booth* (1887) 35 Ch.D. 607; 32 Digest 415, *930.*

ACTION between two mortgagees, second and first, for an account of the proceeds of sale of the mortgaged property on a sale by the defendants as first mortgagees in possession. The facts were not in dispute and there was no suggestion that the power of sale had been improperly exercised, the defence being that by virtue of the Statute of Limitations, the first mortgagees had become absolutely entitled. The facts of the case and the process of devolution whereby one person found himself in the position of being both a second and first mortgagee are clearly stated in the judgment.

Baden Fuller for the plaintiffs.

L. A. Byrne for the defendants.

Clauson, J.: On July 12, 1878, a first mortgage was created upon certain property in West Hartlepool known as the Lawrence Street Property. By this deed the then owner, Kelly, mortgaged the property to W. Gray and John Stonehouse for £900. Gray and Stonehouse were then trustees of an estate known as the Vaux Estate.

On Dec. 9, 1878, a second mortgage was created on the property to A. W. Dobing, of whose estate it will be seen shortly that the plaintiffs in this action are the present trustees. Notice of this second mortgage was duly given to the first mortgagees and receipt of the notice acknowledged.

On Mar. 2, 1881, Kelly conveyed the equity of redemption, subject to the two mortgages, to H. Simpson and G. Manners, and on Mar. 29, 1881, the said Simpson and Manners further charged the property for £100.

On May 28, 1884, A. W. Dobing, the second mortgagee, died and his will was duly proved, and there were two further transfers of this mortgage until on Apr. 15, 1907, this second mortgage was transferred to R. T. Hodgson (the father of the plaintiff Hodgson) and one Benjamin Bean, as the then trustees of the Dobing Estate.

On Jan. 15, 1908, the first mortgage was transferred to the said R. T. Hodgson, together with one Charles Salt, as trustees of the Vaux Estate. We therefore have the position that R. T. Hodgson was as from 1908 onwards a first mortgagee, together with Salt and a second mortgagee, together with Bean, and this was the position which continued down until Sept. 3, 1929, when the said Benjamin Bean died. R. T. Hodgson thereupon became sole mortgagee of the second mortgage, but he, together with Salt, still remained the first mortgagees until he died on May 3, 1932. Now, on Dec. 5, 1932, the second mortgage was transferred to the plaintiff Hodgson, together with a certain other Bean, who are now the trustees of the Dobing estate. On July 13, 1932, the defendant Wilson was appointed a trustee of the Vaux Estate, together with his co-defendant Salt. Mr. Hodgson told us that his father, R. T. Hodgson, was a stockbroker carrying on business in Stockton-on-Tees and West Hartlepool for over forty years prior to his death in 1932. The witness joined his father's firm and was employed therein in a more or less subordinate capacity whilst he was learning the business from 1920 to 1928, in which latter year he became a partner.

On Apr. 18, 1933, the first mortgagees, who were mortgagees in possession, sold the property for £500, and they sold as absolute owners who had acquired a title under the Statute of Limitations, and it is this amount or part of it in respect of which an account is now sought. What happened was that the interest on this first mortgage had been paid until Jan. 12, 1908, and the interest on the second mortgage and the further charge up to Mar. 9, 1908, when interest began to fall into

arrear. There were certain rents of this property, and these rents R. T. Hodgson undertook to collect, as he was a trustee of both the Dobing and the Vaux estates. He then proposed to reduce the interest on the first mortgage which was in arrear and to reduce likewise the interest on the second mortgage, until it was pointed out to him that the first mortgagees were entitled to claim their capital first. So Hodgson paid off the interest on the first mortgage, and also from time to time reduced the capital of that mortgage. He also kept an account to show how much interest was still owing from time to time to the second mortgagees.

R. T. Hodgson continued to deal with the rents in this manner until his death, when the position was that the interest on the first mortgage had been paid to date and the capital reduced from £900 to £200. After his death in 1932 his son, the plaintiff, carried on in the same way. Prior to the sale of the property in April, 1933, the defendants' solicitors had asked and claimed the right to collect the rents of the property. After the sale the plaintiffs now say that they are second mortgagees and that they believe at least some portion of that sum of £500, the proceeds of sale, is due to them in respect of principal and interest on their second mortgage, and they say that they require accounts to show what the surplus is, the capital owing on the first mortgage being now reduced to approximately £200.

The defendants say that under the Real Property Limitation Act, 1874, s. 7, the plaintiffs have lost all right and that they, the defendants, as first mortgagees who had been in possession for more than the statutory period, had become absolute owners.

Now, the general purpose of the section is clearly set out in the side note to the effect that when a mortgagee has regained possession, if the mortgagor does not bring the action to redeem within twelve years, and unless there is an acknowledgment, no action will lie.

Mr. Byrne, for the defendants, has said that there is no evidence of an acknowledgment to prevent the operation of the statute, possession having been taken by the first mortgagees, but in my view he cannot get a possession within the meaning of the statute, to exclude the second mortgagee, as he is himself a second mortgagee. WIGRAM, V.-C., said in *Hyde* v. *Dallaway* (1) at page 530 :

> I cannot compel the purchaser to take a title depending on the operation of the Statute of Limitations under the circumstances of this case. The possession of the mortgagee [he having purchased a life interest in the equity of redemption] appears to me, in point of fact, not to have been adverse.

This case was cited by Mr. Fuller, together with *Wynne* v. *Styan* (2) and *Topham* v. *Booth* (3), in which case it was held by KEKEWICH, J., that when the mortgagee and the mortgagor and the person entitled to the rents and also to the payment of the interest are one and the same

person, the rights of the mortgage trustee were not barred by the Real Property Limitation Act, 1833, s. 40, and that the fact of the rents being payable to one set of trustees and the interest to another set of trustees did not alter the case when the *cestui que trust* was in each case the same person.

Mr. Byrne contended that these cases were all between mortgagor and mortgagee, whereas the present case was between two sets of mortgagees, second and first, the mortgagor not being a party to the action, but in my view the principle was quite clearly laid down in *Hyde* v. *Dallaway* (1), and the question of acknowledgment is superfluous. When the hand to pay and the hand to receive are one and the same, the Statute of Limitations does not run, and this was the main defence in the present case. The plaintiffs are therefore entitled to the required accounts.

Solicitors: *Gibson & Weldon* for *Archer, Parkin & Archer*, Stockton-on-Tees (for the plaintiffs); *Terry, Sherlock & King* for *Gilbert Bunting & Co.*, West Hartlepool (for the defendants).

[*Reported by* Charles E. Eden, *Barrister-at-Law.*]

BURKE *v.* SPICER'S DRESS DESIGNS.

[CHANCERY DIVISION (Clauson, J.), **February 3, 4, 1936.**]

Copyright—Sketch of dress—Dress itself—Reproduction—Original work of artistic craftsmanship—Copyright Act, 1911, *s.* 22.

M. L. B. had designed, and M. B., Ltd., with the consent of M. L, B., from that design had made a dress which they alleged the defendants had copied thereby, as the plaintiffs alleged, infringing the copyright of M. L. B. in the sketch, and of M. B., Ltd., in the dress. In an action for an injunction to restrain the defendants from infringing these copyrights,

HELD : (i) although if someone had posed a lady of similar type in a similar dress in a similar attitude to the sketch, there might have been an infringement of the sketch, the dress of itself was not a reproduction of the sketch.

(ii) any artistic element in the craftsmanship in the making of the dress came from M. L. B.'s design, and the dress was not therefore an original work of artistic craftsmanship entitled to the protection of the Copyright Act, 1911.

[**EDITORIAL NOTE.** This case deals with the question of the reproduction of the sketch-design and whether a dress is a work of artistic craftsmanship The dress was held not to be a reproduction of the sketch, as the dress alone bore no resemblance to the sketch. The dress was held to be a work of craftsmanship, but its artistic element came from the design and was not in the craftsmanship.

AS TO COPYRIGHT IN DESIGNS, see HALSBURY, Vol. 7, pp. 527-529, and FOR CASES see DIGEST, Vol. 13, pp. 174, 175.]

Case referred to :

(1) *Bradbury, Agnew and Company* v. *Day* (1916) 32 T.L.R 349 ; 13 Digest 210, *459*.

ACTION brought by Marjorie Lilian Burke and Margot Burke, Limited, against Spicer's Dress Designs. The plaintiff, Mrs. Burke, said that she was the owner of the copyright in a sketch depicting a woman's dress, and the plaintiff company, who had made a dress by copying the sketch with the consent of Mrs. Burke, claimed that copyright subsisted in the said dress and that they were the owners of it. Both plaintiffs alleged that their respective copyrights had been infringed by the defendants, and they asked for an injunction to restrain the defendants, their servants or agents, from infringing the copyrights of the plaintiffs and for an enquiry as to the damage sustained by the plaintiffs, and for the delivery up of all infringing articles. The defendants denied that copyright subsisted in the dress, on the ground that an article of clothing was not capable of being a subject of copyright under the Copyright Act, 1911, and also that the dress was not a subject of copyright, because it was not an original work, it having been copied from the sketch made by the plaintiff, Mrs. Burke. Also, the dress was a design capable of being registered under the Patents and Designs Act, 1907, and the defendants relied

upon sect. 22 of the Copyright Act, 1911. The defendants, by way of counterclaim, asked for a declaration that they have not infringed the copyright of the plaintiff, Mrs. Burke, and as against the plaintiff company a declaration that no copyright subsists in any dress or alternatively in the dress made by them in the manner mentioned in the statement of claim.

Hon. S. O. Henn Collins, K.C., and *K. E. Shelley*, for the plaintiffs.

E. J. Macgillivray and *P. Stuart Bevan*, for the defendants.

Clauson, J.: The plaintiffs, Mrs. Burke and the company, Margot Burke, Limited, have brought this action to restrain the defendants from infringing the copyright of Mrs. Burke in a certain sketch and the copyright of the plaintiff company in a certain dress. Mrs. Burke gave evidence and told me that the co-plaintiff company were makers of ladies' frocks, and she told me she had made a certain design and the plaintiff company, by their work-women, have made a frock which followed the lines of that design. The frock was put upon a young lady and there was no doubt that Mrs. Burke was perfectly right in saying that the frock followed the lines of the sketch. It is a mere accident that I saw the frock upon the young lady. If the frock had been held up instead of being worn, it is doubtful whether it would have been so plain to me that it followed the lines of the sketch. I do not know. The plaintiff company had a sketch made which was subsequently embodied in a frock.

[His Lordship here referred to Copyright Act, 1911, s. 22, and to the provisions of the Patents and Designs Act, 1907, which deal with reproduction for commercial purposes.]

It was admitted that the defendants had made a frock which was precisely the same as that made by the plaintiff company, and Mrs. Burke said that she had never consented to the copying of either the sketch or the frock. She said that each dress is made for one customer, as the same dress would not suit every customer. Customers liked to have their dresses made for them alone, and she had to consider the individuality of the customers.

Mrs. Burke asks for an injunction to restrain the defendants from infringing her copyright in the sketch. It is said that, by the wording of the Copyright Act, 1911, the defendants, by making the dress which they have made, have reproduced the sketch or a substantial part thereof in a material form. The sketch is the sketch of a lady of a particularly slim figure, dressed in a frock with flouncings arranged in a particular way. If the complaint Mrs. Burke were making was that somebody had posed a lady of a somewhat similar type in a similar frock in a similar attitude—in other words, that there had been a living picture made of the design—it might be that that would be an infringement which she would be entitled to restrain, because that might well be covered by the decision

of COLERIDGE, J., in the case of *Bradbury, Agnew and Company* v. *Day* (1), a case which no doubt would be binding upon me. But it is not that about which the plaintiff, Mrs. Burke, complains. She complains that the defendants have brought into being a frock which no doubt when placed upon a lady might be used to produce a picture of the design. But when I look upon the frock, it seems quite impossible to say that the frock—and nothing more—is a reproduction of the sketch. It is not like it at all. It is upon these words that Mrs. Burke must base her case. The mere fact that the general design of the frock may have been suggested by what the dressmaker saw in the sketch does not assist. In my view, Mrs. Burke has prepared a design which might be registered under the Patents and Designs Act, 1907, but that is a different matter. If the design is registered under the Patents and Designs Act the lady would have some right to the protection of that Act.

The claim of the plaintiff company is rather different. They claim that they have a copyright in the frock, and that that frock has been reproduced and in consequence they seek to restrain the infringement. The way they claim copyright is this. They say the frock has been made up by their workwomen and that it is their frock in every sense. They say that they have the same right to reproduce this work as being an original artistic work. They point to the definition of artistic work and say it includes the work of an artistic frock, and they say they made this original work and are entitled under the Copyright Act to restrain the defendants from reproducing this original work of artistic craftsmanship. The first difficulty is that all that they or their workwomen have done is to do certain acts of craftsmanship, and they have produced a work of craftsmanship. It is said that having regard to the beauty of this frock, it is not only a work of craftsmanship, but it is a work of artistic craftsmanship. Where was the artistic element originally? It was not in the plaintiff company's workpeople. They only produced the article by mechanical processes. They were craftsmen, but not artistic craftsmen. They produced the artistic qualities from the inspiration of Mrs. Burke in her sketch, and accordingly, although I can well understand that the work the plaintiff company made was a work of craftsmanship, it is not original and is not protected by the Act, and upon that ground I do not feel able to hold that the frock is an original work of artistic craftsmanship. I can conceive it possible that Mrs. Burke might design a frock and make it all herself, and if she did that, I can well understand she might be the author of original work of artistic craftsmanship. That is not what has happened in this case. I do not want it to be assumed that, even so, she necessarily would be entitled to the protection of the Copyright Act. It is not necessary to decide that.

[His Lordship then referred to the meaning of the term artistic, and said

that the net result of the matter was that in his view the action failed and must be dismissed with costs. The counterclaim was also dismissed, but without costs.]

Solicitors: *Arthur Benjamin & Cohen* (for the plaintiffs); *Church, Rackham & Co.* (for the defendants).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law*]

Re COHEN'S WILL TRUSTS, CULLEN *v.* WESTMINSTER BANK, LIMITED.

[CHANCERY DIVISION (Luxmoore, J.) **February 11, 1936.**]

Will—Absolute gift—Effect of subsequent words—"Subject to the provisions and directions hereinafter contained."

Testator by his will devised and bequeathed the residue of his real and personal estate equally among several named children "subject to the provisions and directions hereinafter contained." The provisions and directions settled the shares of daughters, but failed to dispose of the whole interest of a married daughter who died without children.

HELD: a gift in these terms is not an absolute gift and the personal representatives of the daughter were not entitled to the interest undisposed of.

[**EDITORIAL NOTE.** This case deals with the cutting down of a gift that is absolute in its terms. The gift was said to be subject to "provisions and directions" and the question is whether this is an expression that "cuts down" the interest given or merely concerns the manner in which the interest is to be enjoyed.

FOR THE LAW ON THE POINT, see HALSBURY, 1st Edn., Vol. 28, pp. 762, 763, and FOR THE CASES, see DIGEST, Vol. 44, pp. 915-920, Nos. 7736-7781.]

Cases referred to:

(1) *Lassence* v. *Tierney* (1849) 1 Mac. & G. 551; 44 Digest 554, *3715.*
(2) *Hancock* v. *Watson* [1902] A.C. 14; 43 Digest 644, *792.*
(3) *Re Payne, Taylor* v. *Payne* [1927] 2 Ch. 1; 43 Digest 644, *798.*
(4) *Rucher* v. *Scholefield* (1862) 1 Hem. & M. 36; 37 Digest 495, *887.*

ADJOURNED SUMMONS. By his will made in 1901, testator dealt with the residue of his estate in the following terms: "I devise and bequeath the residue of my real and personal estate equally amongst" several named children, "subject to the provisions and directions hereinafter contained." Such provisions in effect settled the daughters' shares and the question raised was the destination of the share of a daughter who died without leaving issue.

Hon. Denys Buckley for the plaintiff, one of the present trustees of the will, stated the facts.

Cyril Radcliffe, K.C., and *Andrewes Uthwatt*, for the defendant, Leslie Winston Cohen and others, claimed an accruer of the daughter's share and against an intestacy.

F. R. Evershed, K.C., and *H. A. Rose*, for the Westminster Bank Ltd., the legal personal representatives of Rosetta Jonas deceased. The words of the will create an absolute gift (*Hancock* v. *Watson* (2) per LORD DAVEY at p. 16).

Andrew Clark for the next of kin. There was no absolute gift (*Lassence* v. *Tierney* (1)). The will must be read as a whole and as creating one system of trusts (*Re Payne* (3), *Rucher* v. *Scholefield* (4)). He relied on *Re Payne* (3).

Luxmoore, J.: The question which I have to determine in this case is whether, in the events which have happened, there is an intestacy with regard to part of the testator's estate or whether that part passes to the estate of Rosetta Jonas under the trusts of his will. The testator made his will in 1901 and by it he left his residuary estate in these terms: "I devise and bequeath my real and personal estate to be equally distributed amongst my children as hereinafter named"— and here he names seven of such children, amongst whom is his daughter Rosetta, the wife of Harry Nathan Jonas, and it goes on to say: "Subject to the provisions and directions hereinafter contained."

Then follow words which provide that the children who have received money from the testator during his lifetime are to bring such money into account. The shares of sons were to be retained by the trustees upon certain trusts and terms which provide in effect that a son takes the income for life or until he becomes bankrupt, or assigns and so forth, and then there is a direction that in the event of such bankruptcy or other act of a son that a discretionary trust should come into being. There are also certain provisions against any son who should marry out of the Jewish faith. After the death of any son, such son's share was to be held upon trust for the children or child of such son by an approved marriage, as should attain the age of 21 or marry as tenants in common in such shares as such a son shall by deed appoint, or in default of appointment in equal shares, and if there are no children of any son, such son's share to fall back into residue divisible among the other children, providing that every such share accruing was to be subject to the same terms and provisions as the original share of each such child.

There was also a provision with regard to the shares of the testator's daughters, the trustees to hold upon trust for the daughters during their lifetime and if any of the daughters should die leaving children, two-thirds of the income of her share is to go to any husband by whom she should have had such children for his maintenance until he should die or marry again, and so long as he provides for the maintenance and education of such children. In the case of any daughter not having a child by any such approved marriage, half of the income of her share is given to any surviving husband during his life or until he should re-marry, and the other half is to fall into residue.

The daughter, Rosetta Jonas, died on Oct. 8, 1929, and in 1931 her husband, Harry Nathan Jonas, died. There were no children of the marriage. The first question is what disposition has the testator made. He has said that in the case of a daughter where there was no child the surviving husband should take half the income of her share for his life, and the will goes on to direct that the remaining half of the income goes into residue, which is an indefinite gift of income. It is the half of Rosetta's share in which her husband had no life interest which is to

accrue to the other shares and that being so, there is no disposition of the capital of that part of her share which her husband enjoyed for life, and the question is does that go to the legal personal representatives of the daughter or is it undisposed of, and therefore goes to the next-of-kin ?

In order for it to be said that it goes to the daughter I must find the conditions which prevail in *Lassence* v. *Tierney* (1) present here. Is there an absolute gift, to each of my children, in the first instance or is it merely a qualified gift ? The question is one of construction. If the disposition is an absolute gift upon which has been engrafted certain trusts which do not exhaust the disposition, then the gift is an absolute gift which prevails and the undisposed of part of it goes to the children to whom it was originally given.

In this case the will is not like many of those which have been referred to. In the first instance there is a gift in the terms already read, not to particular people in equal shares, and the words are not the usual words which you would expect to find to constitute an absolute gift. The form seems to indicate that the testator had in mind an enumeration of the number of shares, and having that in mind, the words " and subject to the provisions and directions hereinafter contained " are followed by the trusts and provisions which I have already read.

The form of the will, is, in my judgment, not such as to confer an absolute gift. I think the clause is directed to ascertaining the number of shares to which the trusts shall apply. To my mind it is quite clear by the form itself and by the fact that there is an express direction that each share is to be subject to certain provisions and directions. And it is worthy of note that in the provisions in the will imposing restrictions on the marriage of children and grandchildren the testator speaks of their interests as given to the children for life and to the grandchildren as an absolute interest.

It cannot be said that there is an absolute gift to make *Lassence* v. *Tierney* apply, and, I think, the present case falls within the second class when the original gift mentions directions for the division of the estate, and that the testator's following words attach to those directions and that there is one system of trusts, and it follows that there is an intestacy with regard to the capital of one-half part of the share of Rosetta, after the death of her husband, Harry Nathan Jonas, and that that half passes to the next of kin.

Solicitors : *Montagu's and Cox & Cardale* (for the plaintiff) ; *Wild, Collins & Crosse* (for the defendant, Leslie Winston Cohen, and others) ; *Johnson's and Blake* (for the defendants, Westminster Bank Ltd.) ; *Montagu's and Cox & Cardale* (for the defendants, the next of kin).

[*Reported by* CHARLES E. EDEN, ESQ., *Barrister-at-Law.*]

WESTERN ENGRAVING CO. *v.* FILM LABORATORIES, LTD.

[Court of Appeal (Slesser and Scott, L.J.J., and Eve, J.), **February 4, 1936.**]

Nuisance—Escape of water from factory premises—Extraordinary user—Doctrine of Rylands v. Fletcher.

Defendants, the occupiers of factory premises on the second floor of a building, on several occasions allowed water to escape into the factory premises of the plaintiffs on the floor below, whereby damage was caused to the plaintiffs' property. The defendants' business included the washing of cinematograph film, for which purpose an extraordinarily large quantity of circulating water was necessary, also a boiler, and carboys for storing water.

Held: as the water was brought by the defendants on to their premises for their own special purposes, and not for the common benefit of the defendants and the plaintiffs, and the defendants' user was not a normal user for the purposes for which both the plaintiffs and the defendants were occupying the premises, the principle of the decision in *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330 applied, and the defendants were liable to the plaintiffs in damages and need not prove specific acts of negligence by the plaintiffs on each occasion.

[**EDITORIAL NOTE.** The interest in this case lies in the fact that the premises were factory premises. It must, it would seem, be assumed that the natural user of factory premises might entail the bringing upon them of more water than is required for ordinary domestic purposes; but it is now clear that large quantities of water can only be brought upon industrial premises at the occupier's peril.

As to Liability for Escape of Water, see HALSBURY, 1st Edn., Vol. 21, pp. 401, 402; and for the Cases see DIGEST, Vol. 36, pp. 191, 192, Nos. 323, 329, 330.]

Cases referred to:

(1) *Fletcher* v. *Rylands* (1866) L.R. 1 Exch. 265 on appeal *sub nom. Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330; 36 Digest 187, *311*.
(2) *Carstairs* v. *Taylor* (1871) L.R. 6 Exch. 217; 36 Digest 189, *314*.
(3) *Blake* v. *Woolf* [1898] 2 Q.B. 426; 36 Digest 196, *369*.
(4) *Rickards* v. *Lothian* [1913] A.C. 263; 36 Digest 194, *353*.
(5) *Ross* v. *Fedden* (1872) L.R. 7 Q.B. 661; 36 Digest 194, *350*.

Appeal against a judgment of His Honour Judge Dumas delivered on Oct. 21, 1935, at Westminster County Court, ordering the defendants (the appellants) to pay £34 16*s*. damages, and costs, for injury done to the property of the plaintiffs.

The plaintiffs were engravers, occupying factory premises on the first floor of a building in Wardour Street, London. The defendants, who occupied the factory premises immediately above, used them for washing cinematograph film. This work needed the use of large quantities of circulating water in a closed apparatus, a boiler, a sink, and a number of containers, including carboys. On several occasions water escaped from the defendants' premises and damaged property in the plaintiffs' premises.

In consequence of the plaintiffs' complaints the defendants had a new floor put down, but it did not prevent further escape of water.

The defendants gave evidence to show that each of the escapes was due to circumstances outside their control which could not have been foreseen by reasonable diligence.

Anthony Marlowe, for the appellants: The defendants did all that reasonable men could be expected to do. There was no evidence of negligence, and even if the onus was on the defendants to prove absence of negligence, they had discharged that onus. To bring water into a boiler and into a circulating apparatus is normal user of factory premises. If water is brought on to premises in a way that amounts to nothing more than ordinary and reasonable user, and it escapes through inadvertence, there is no liability: *Blake* v. *Woolf* (3); *Rickards* v. *Lothian* (4). The plaintiffs must prove specific acts of negligence by the defendants on every occasion on the escape of water; or else that the user of the premises by the defendants was unreasonable, that the defendants brought upon it something dangerous to the plaintiffs, and that the plaintiffs did not consent to the defendants so doing. There is no finding that defendants' user of the premises was unreasonable and extraordinary, or that the water which they brought upon the premises was a dangerous thing.

A. S. Diamond, for the respondents, was only called on the amount of the damages.

SLESSER, L.J.: This appeal fails. It was a claim brought by the Western Engraving Co., Ltd., who are the occupiers of the lower floor of a factory building in Wardour Street, against Film Laboratories, Ltd., who have a factory immediately above it. The evidence goes to show that the film company, as a part of their business, need a special apparatus for film washing which occupies a very large part of their premises; and that this film washing necessitates a constant flow of water. There is also on the same premises a boiler, which is used for steam heating. For the necessary purposes of carrying on their business the defendants have to use water in unusual quantities, beyond those necessary for ordinary domestic purposes; it has, for example, to be contained in carboys and other containers.

The action was brought by the plaintiffs because, as they allege, on several occasions the defendants negligently allowed water to escape from their floor of the premises on to the machinery and apparatus of the plaintiffs, and injury has been done to that apparatus in consequence: on one occasion to the extent of £2, on another to the extent of one shilling, on another to the extent of five guineas, and, lastly and most serious, to the extent of £27 10*s*. damage to a lathe.

We have been asked to examine separately and in detail the allegations of negligence made against the defendants. In the view which I take of

this case it is not incumbent upon the plaintiffs to show that on each separate occasion there was a specific failure to take specific precautions to prevent water coming through upon that occasion. I do not think, for myself, that this is a case where it can be said that the conducting and the user of the water on the defendants' premises was really for the general benefit of the defendants and of the plaintiffs, and was a normal user for the purposes for which the land was occupied by both of them. Rather do I think that this is a case where the defendants have used water in a particular and peculiar way for their own purposes, and for their own purposes have allowed it to be in this film circulating bath, and have filled carboys with water; and it has been allowed to be there in order that they can carry on their industry, which necessitates the user of water. In other words, I am of opinion that this is a case which falls within the general principle of *Fletcher* v. *Rylands* (1), and not within the exceptions to that principle. It falls, as I think, within this statement of Blackburn, J., in that case:

> We think that the true rule of law is, that the person who for his own purposes brings on to his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape.

Those words were adopted in the House of Lords by Cairns, L.C., and if they are applied to this case I think there was ample evidence on which the learned Judge could find that, this water having been disposed about the defendants' factory for the purposes of their business, they failed, and, in fact, failed after some warnings which they had received that water was escaping through to the plaintiffs' premises, to keep it there at their peril.

With regard to the interesting argument to which we have listened, and for which we are indebted, the cases which have been cited to us, such as *Carstairs* v. *Taylor* (2), *Blake* v. *Woolf* (3), and *Rickards* v. *Lothian* (4) deal with the exceptions to the general rule of liability laid down in *Fletcher* v. *Rylands* (1). Bramwell, B., in *Carstairs* v. *Taylor* (2), at p. 221, makes the distinction very clear. He says this:

> But the defendant has here conducted the water to the place from which it poured on to the plaintiffs' premises, and he may therefore be said to have poured it on to them. So far the case resembles *Rylands* v. *Fletcher* (1); and I am satisfied that it makes no matter that the defendant is the plaintiffs' landlord, but that the case must be argued as if there had been a severance of the freehold. But I am clearly of opinion that there is a material difference between the cases. In *Rylands* v. *Fletcher* the defendant, for his own purposes, conducted the water to the place from which it got into the plaintiff's premises.

There the conduct was no more for the benefit of the defendant than for that of the plaintiffs. I am of the opinion that in the present case the learned Judge was justified in finding in favour of the plaintiffs on the

ground that the defendants, for their own purposes, conducted the water to the place from which it got into the plaintiffs' premises.

I would only add this. It has been argued before us that we do not know on what grounds the learned Judge came to his decision. If that is so, it seems to me to be an increased difficulty against the appellants. If the appellants do not know the grounds on which the learned Judge came to his decision, it makes it even more difficult for them to say that those grounds were wrong in law. But as a matter of fact I think, giving a reasonable construction to this matter, that it would be wrong to send this case back for a new trial. It is quite evident to my mind what happened in this case. Knowing that this water was allowed to percolate through, and having come to the conclusion that this business obviously required a special and peculiar use of water, I think it would merely increase the costs uselessly to order a new trial here.

I would only refer in conclusion to a passage which fell from BLACKBURN, J., in *Ross* v. *Fedden* (5), at p. 665 :

> Probably, if the defendants had got notice of the state of the valve and pipe and had done nothing, there might have been ground for the argument that they were liable for the consequences.

I think it is a further difficulty in this case that, from the earliest time of the complaint, the defendants had clear knowledge that their water when it escaped did go through and had already on one occasion injured the plaintiffs' property. Yet it appears from the finding of the learned Judge that they took no precautions at all. For all these reasons I am of the opinion that this appeal fails and must be dismissed with costs.

SCOTT, L.J. : I agree. In the learned Judge's note, after it was submitted on behalf of the defendants, relying on *Rickards* v. *Lothian* (4), that there was no case to meet, the learned Judge says : "I hold that there is a case to answer." That decision rather goes to indicate that the Judge did consider the general principle of law in *Fletcher* v. *Rylands* (1), which was discussed in *Rickards* v. *Lothian* (2). I myself take the view that where for manufacturing purposes water is brought on to various parts of the floor for the purpose of the manufacturing occupier of that floor and not for any common purpose with any other occupier of the building, you must presume that the principle in *Fletcher* v. *Rylands* (1) applies. I do not think that is an ordinary user of the house such as is the case when water is present for the common domestic use of different tenements. The learned Judge was entitled to hold here that on the principle of *Fletcher* v. *Rylands* (1) there had been a failure to keep in the water which was brought there for the defendants' own purposes and for the purposes of nobody else.

Apart from that, however, I think there was evidence upon which he could decide that there were specific acts of negligence in having a leaky pipe, cock or boiler—whichever way you like to look at it.

There are several passages to which I might refer in the Judge's note where that is mentioned. The chief item of damage, the damage to the lathe, appears quite clearly to have been caused by water coming through from the boiler, because the lathe was under the boiler, and that is the way by which the water came down. I therefore think that, on that item at any rate, there was specific evidence; and I think there was some specific evidence on the other cases also. For those reasons I think that on the issue of liability there is no ground for disturbing the decision of the learned Judge.

Eve, J.: I think the case is entirely within the principle of *Fletcher* v. *Rylands* (1), and I therefore agree with the conclusions at which my learned brothers have arrived.

Solicitors: *Theodore Goddard & Co.* (for the appellants); *H. E. Girling* (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

BOWATER, W. V., & SONS LTD. *v.* DAVIDSON'S PAPER SALES LTD.

[Court of Appeal (Greer, Slesser and Scott, L.JJ.), **January 27, 1936.**]

Practice—Appeal—Appeal from Mayor's and City of London Court—Jurisdiction of Court of Appeal—Common Law Procedure Act, 1852 (c. 76)—*London (City) Small Debts Extension Act*, 1852 (c. lxxvii)—*Mayor's Court of London Procedure Act*, 1857 (c. clvii)—*Supreme Court of Judicature Act*, 1873 (c. 66)—*Local Government Act*, 1888 (c. 41)—*County Courts Act*, 1888 (c. 43)—*Mayor's and City of London Court Act*, 1920 (c. cxxxiv)—*Supreme Court of Judicature (Consolidation) Act*, 1925 (c. 49)—*Administration of Justice (Appeals) Act*, 1934 (c. 40).

(i) An appeal from proceedings in the Mayor's and City of London Court within the County Court jurisdiction, lies to the Court of Appeal; (ii) *Semble:* where the proceedings are not within the County Court jurisdiction appeal lies to the Court of Appeal if the old Court of Exchequer Chamber would have had jurisdiction in error, otherwise appeal lies to the Divisional Court with a further appeal with leave to the Court of Appeal.

[EDITORIAL NOTE. So far as the jurisdiction of the Court of Appeal to hear claims from the Mayor's and City of London Court which are outside the jurisdiction of the County Court is concerned, everything said in this case is clearly *obiter*. At the same time if and when the matter comes to be argued, it is obvious that the judgment of Slesser, L.J., herein must be the starting point of the argument and it is for that reason alone that this case is reported. One other point must be made. The judgments speak of claims of £100 or less and claims of over £100. It is probably more correct to speak of claims within or beyond the County Court jurisdiction, as there are some aspects of the County Court jurisdiction where the determining factor is not the question whether the claim exceeds £100 or not.

As to the Jurisdiction of the Mayor's and City of London Court generally, see HALSBURY, Vol. 20, p. 286, and as to Appeals, p. 298, and for Administration of Justice (Appeals) Act, 1934 (c. 40), see HALSBURY COMPLETE STATUTES OF ENGLAND, Vol. 27, p. 459. For Cases, see DIGEST, Vol. 34, p. 534, 535.]

Cases referred to :

(1) *Newman* v. *Klausner* [1922] 1 K.B. 228 ; 34 Digest 535, *85*

(2) *Appleford* v. *Judkins* (1878) 3 C.P.D. 489 ; 34 Digest 535, *94.*

(3) *Le Blanch* v. *Reuter's Telegram Co.* (1876) 1 Ex. D. 408 ; 34 Digest 535, *91.*

Appeal by the defendants from a judgment of the Common Serjeant sitting in the Mayor's and City of London Court on a claim for £30 for goods sold and delivered. No point arises upon the substantive appeal ; but the question of the jurisdiction of the Court of Appeal to hear County Courts appeals was fully discussed in the judgment of Slesser, L.J., and his conclusions are referred to in the other judgments given herein.

Patrick A. Devlin for the appellants.

W. H. Moresby for the respondents.

Greer, L.J. : Delivered judgment upon the main appeal allowing it with costs.

Slesser, L.J. : I agree that this appeal succeeds for the reasons stated by my Lord. I wish, however, to add some observations on this case which arise on an important question of jurisdiction.

This is an appeal from the Common Serjeant sitting in the Mayor's and City of London Court. The action was for £30 odd, for goods sold and delivered, and judgment was given for that sum. The defendants appealed on the ground that there was no evidence on which the learned Judge could properly have come to his conclusion and that he improperly rejected evidence. By the Administration of Justice (Appeals) Act, 1934, s. 2, it is provided that every appeal from a judgment of a judge of a county court shall lie to the Court of Appeal and not to the High Court as was formerly the case.

The Common Serjeant is not a judge of a county court ; nor is the Mayor's and City of London Court strictly a county court. By the Mayor's Court of London Procedure Act, 1857, s. 43, he presides in the Mayor's Court in the absence of the Recorder, and his appointment is now vested in the Crown, not by the County Courts Act, but by the Local Government Act, 1888, s. 42 (14). The present Mayor's and City of London Court is constituted by the Mayor's and City of London Court Act, 1920, and is known as the Mayor's and City of London Court (sect. 1). The judges, among others, include the Common Serjeant (sect. 2 (1)). By sect. 9 it is provided :

> For the purpose of all causes and proceedings within the jurisdiction of a county court, the Court shall be deemed to be a county court and shall subject to the provisions of this Act be governed by the statutes and rules for the time being

applicable to county courts so far as they do not conflict with the London (City) Small Debts Extension Act, 1852.

The present claim for £30 odd is within the jurisdiction of a county court and, therefore, it is necessary to look at the 1852 Act, because, by sect. 11 of the 1920 Act, nothing in the Act is to repeal or vary the provisions of the Act affecting the Mayor's Court or the City of London Court except so far as those Acts are inconsistent with the 1920 Act.

The London (City) Small Debts Extension Act, 1852, regulated the procedure of the Sheriff's Court of the City of London, which was not a county court, and by sect. 78 an appeal was granted in the form of a case to the Superior Courts of Common Law at Westminster. By the County Courts Act, 1888, s. 185, the Sheriff's Courts held by virtue of the Small Debts Extension Act, 1852, were thereafter to be held by the name of the City of London Court, and its decisions were to be subject to appeal in the same way and on the same conditions as the decisions of a county court were for the time being; that is, under sect. 120, to the High Court. By sect. 186, a county court shall mean and include the City of London Court and the judge of that Court.

It follows, therefore, although the Mayor's and City of London Court is not mentioned *eo nomine* in the 1934 Act, that, in so far as appeals from county courts are now to be heard directly in the Court of Appeal, appeals from the Mayor's and City of London Court within the county court jurisdiction are to be heard in the same way for the time being as coming under the County Courts Act, 1888, s. 156, and sect. 2 of the 1934 Act. Thus, the only limitation in the Mayor's and City of London Court Act, 1920, s. 9, to the Court being deemed a county court when it is acting within county court jurisdiction, namely, the provisions of the London (City) Small Debts Extension Act, 1852, does not produce any difficulty, because the Act of 1852, as amended in 1888, applies the way of appeal from the county court for the time being of the 1852 Act.

It follows, therefore, that no objection to jurisdiction can be taken in the present case, but nevertheless a most anomalous position has arisen, in that the Mayor's and City of London Court when dealing with a case beyond the limits of county court jurisdiction is not a county court either by interpretation of statute or otherwise. Appeals for more than £100 are still governed by the Mayor's Court of London Procedure Act, 1857, s. 8 (see *Newman* v. *Klausner* (1)).

Under that Act, appeals went either to the Court of Exchequer Chamber or to one of the Superior Courts of Common Law, according to the nature of the appeal. The appeal, when not to the Exchequer Chamber under the Judicature Act, 1873, s. 45, was to be determined by Divisional Courts, for by the words of sect. 45 " appeals from a county court or other inferior court may be heard and determined by Divisional

Courts of the High Court" : (*Appleford* v. *Judkins* (2)). On the other hand, by the Mayor's Court of London Procedure Act, 1857, s. 4, in all cases of error arising in the Mayor's Court the Exchequer Chamber shall be the Court of Error.

By sect. 18 (4) of the 1873 Act, the Court of Appeal had vested in it all jurisdiction and powers of the Court of Exchequer Chamber, so that in the language of MELLOR, J., in *Le Blanch* v. *Reuters Telegram Co.* (3) error has been abolished and appeals substituted for it. It follows, therefore, that, as the Court of Exchequer Chamber would have had, before recent legislation, exclusive jurisdiction to entertain by way of error the questions arising upon this record, the Court of Appeal is now the proper tribunal to decide them by way of appeal. By the Mayor's Court Rules, 1892, Ord. IV, r. 1, demurrer is abolished, and a party may raise by his pleadings a point of law.

By the Common Law Procedure Act, 1852, s. 148, the writ of error was abolished, and sect. 149 lays down how error might thereafter be brought by memorandum alleging error in law in the record and the proceedings. These sections were applied by an Order in Council to the Mayor's Court. Bills of exceptions were no longer necessary and, as has been pointed out, by the Judicature Act appeal was substituted for error ; yet some day it may be necessary to consider how far this jurisdiction of the Court of Appeal, deriving through the Exchequer Chamber, is limited to cases where error on the record could have been affirmed by bill of exception and demurrer. As I have said since 1892 demurrer has been abolished. However, this may be, it is quite clear that appeals other than those by error are still to a Divisional Court when the sum claimed is greater than the county court jurisdiction under sect. 45 of the Act of 1873, now sect. 24 (*a*) of the Supreme Court of Judicature (Consolidation) Act, 1925.

The anomaly which the legislature may think fit some day to consider, to which I call attention, is this, that, where the proceedings are for £100 or less, the appeal lies to this Court, and also where the amount claimed is greater if the old Court of Exchequer Chamber could have entertained jurisdiction in error ; but where the appeal was not entertainable, though larger in amount than £100, it must be heard by an inferior court, with an appeal to this Court only with leave.

Some of the results of the present confusion were pointed out by the Divisional Court in 1922, in *Newman's* case (1), which decided that an appeal from Mayor's and City of London Court in an original Mayor's Court action must still be brought within two days, and that the High Court has no jurisdiction to extend the time ; so that to this extent the greater the claim the lower the status of the appeal tribunal to whom the appeal is to be brought. I think that this state of affairs justly entitles me to describe it as an anomalous position.

Greer, L.J.: With regard to the preliminary point, I did not mention it because I knew that my brother Slesser had gone into it in considerable detail · but I did look at the statutes, and, so far as they affect the question in this case, namely, where in the Mayor's Court less than £100 is claimed the appeal goes from the Judge of the Mayor's Court direct to this Court just as it would if the same matter had been tried in a court which was never anything but a county court. The reference in the 1934 Act to an appeal from a judge of the county court is explained by the fact that some cases are decided by the registrars of the county courts, and it was not intended that those should come to the Court of Appeal, but only those cases decided by the learned Judge. I only intervene to say that I prefer to leave the question as to where an appeal is to go if more than £100 is claimed until the question specifically arises in the case.

Scott, L.J.: I agree with the judgment that has been delivered. I recognise with gratitude the work done by my brother Slesser on the question of jurisdiction and concur in what Greer, L.J., has said as to the limited scope of our actual decision on the point of this case.

Solicitors: *Clifford-Turner & Co.* (for the appellants); *Goulden, Mesquita & Co.* (for the respondents).

[*Reported by* Philip F. Skottowe, Esq., *Barrister-at-Law.*]

GIBBS *v.* BARKING CORPORATION.

[COURT OF APPEAL (Slesser and Scott, L.JJ. and Eve, J.), **January 31, 1936.**]

Negligence—Schoolmaster—Physical training—Liability of Education Authority.

In the course of gymnastic training a schoolboy was required to vault over a horse. For some reason the boy landed "in a stumble" and was injured. The master in charge did nothing to assist the boy in landing :—

HELD : the master had not taken reasonable care and the Education Authority were liable in damages to the injured boy.

[EDITORIAL NOTE. This case is only of interest when it is considered along with the authorities previously reported. The earlier authorities which can most usefully be compared with this case are *Smerkinich* v. *Newport Corporation* (1912), 76 J.P. 454, *Chilvers* v. *London County Cuoncil* (1916), 80 J.P. 246, and *Jones* v. *London County Council* (1932), 96 J.P. 371. In the other authorities it seems that the teacher was not actually present in the room at the time of the accident. The authorities are collected in the DIGEST reference given below.

FOR LIABILITY OF SCHOOLMASTERS AND EDUCATION AUTHORITIES FOR NEGLIGENCE, see HALSBURY, 2nd Edn., Vol. 12, p. 41, para 86, and FOR THE CASES, see DIGEST, Vol. 19, pp. 556, 557, Nos. 17-24.]

THIS was an appeal brought by the defendants from the judgment of His Honour JUDGE BEAZLEY at Ilford County Court, dated Sept. 23, 1935, awarding damages for personal injuries sustained by the plaintiff by reason of the failure of the second defendant, the schoolmaster responsible for physical training at a school at Barking, of which the Barking Corporation are the education authority, to take proper care, and that this lack of care was the cause of the accident.

Croom-Johnson, K.C., and *W. E. P. Done* for the appellants.

Hector Hughes, K.C., and *J. R. O Jones*, for the respondent.

Counsel for the respondent were not called upon.

SLESSER, L.J.: It is a question of fact that has been decided by the learned County Court Judge. The respondent was required to undergo gymnastic training in the school which he was attending and, in company with other boys, was required to vault over a horse, and the learned County Court Judge finds that it is the duty of the games' instructor to see that each boy, as he jumps over the horse and comes to the other side, does not fall. Whether this boy fell before he had completely finished his task of jumping over the horse or whether he fell just after he had jumped over the horse and before he had recovered his complete equilibrium, the learned Judge found that he landed in a stumble and there is ample evidence, in my opinion, why he could come to that conclusion. He landed on the mat on the far side and stumbled and fell. The master and the boy agree on that. That might properly be held to be a fall or stumble during the process of the vaulting in

which the master was under an obligation to take care and the learned County Court Judge has found that there was an absence of reasonable care. The games' master does not seem to have acted with that promptitude which the law requires. With regard to the local authority, everything against them was withdrawn before the case came on to be heard. Their only liability is as the employers of the master. The appeal fails and it will be dismissed.

Scott, L.J., and Eve, J., concurred.

Solicitors: *W. C. Crocker* (for the appellants, Barking Corporation); *Eric G. Floyd* (for the appellant, Crick); *Cliftons* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

FENTON'S TRUSTEE *v.* INLAND REVENUE COMMISSIONERS

[Court of Appeal (Lord Wright, M.R., Romer and Greene, L.JJ.) **January 24, 1936.**]

Income Tax—Bank interest—Loan account—Interest added to loan each half-year—Paid "out of profits or gains brought into charge"—Income Tax Act, 1918, *s.* 36, *All Schedules Rules, rr.* 19, 21.

F. borrowed a large sum from a bank, in respect of which the bank opened a separate loan account. Each half year interest at an agreed rate and without deduction of tax was placed to the debit of the account and the aggregate amount was then treated as principal for the following half-year:—

Held (Greene, L.J., dissenting): such interest was not paid "out of profits or gains brought into charge," and F. and those claiming under him were not entitled to repayment of income tax under Income Tax Act, 1918, s. 36.

[**EDITORIAL NOTE.** This case differs from most of the previous authorities on the point in that, in the earlier cases, statutory bodies were bound by statute or otherwise to pay interest out of moneys other than "profits or gains brought into charge." This case concerning a private individual who is free to pay out of what funds he chooses raises difficult questions of accountancy, and how far the private individual may be ultimately bound by a statement in his own accounts or by payment from a particular fund or account. As is well known accounts for income tax purposes are not the same as the ordinary profit and loss account of a business, and this view of the case is fully explored in the dissenting judgment of Greene, L.J. The question of whether in the circumstances there had been, in fact, a "payment" of interest within the meaning of the Income Tax Act was described by Finlay, J., as "very artificial." Romer, L.J., in the closing passage of his judgment describes it as "wholly imaginary." It would seem unsatisfactory that such terms can properly be used in respect of a liability to income tax or a right to repayment.

For a Statement of the Law, see HALSBURY, 2nd Edn., Vol. 17, pp. 241, 242, paras. 486-489, and for the Cases, see DIGEST, Vol. 28, pp. 73, 74, Nos. 392-397 and Supp.]

Cases referred to :

(1) *Re Jauncey, Bird* v. *Arnold* [1926] Ch. 471 ; 32 Digest 407, *860.*
(2) *Inland Revenue Commissioners* v. *Holder* [1932] A.C. 624 ; 16 Tax Cas. 540 ; Digest Supp.
(3) *Reddie* v. *Williamson,* 1 Macph. (Ct. of Sess.) 228 ; 7 Digest 194, case (*n*).
(4) *Birmingham Corporation* v. *Inland Revenue Commissioners* [1930] A.C. 307 ; Digest Supp.
(5) *Sugden* v. *Leeds Corporation* [1914] A.C. 483 ; 28 Digest 74, *397.*
(6) *Central London Railway* v. *Inland Revenue Commissioners* (1935) 151 L.T. 333 ; Digest Supp.
(7) *London County Council* v. *A.-G.* [1901] A.C. 26 ; 28 Digest 73, *392.*
(8) *Dickson* v. *Hampstead Borough Council* (1927) 11 Tax Cas. 691 ; Digest Supp.
(9) *Howe (Earl)* v. *Inland Revenue Commissioners* [1919] 2 K.B. 336 ; 28 Digest 111, *683.*
(10) *A.-G.* v. *Metropolitan Water Board* [1928] 1 K.B. 833, 13 Tax Cas. 294 ; Digest Supp.

CASE STATED by Special Commissioners for Income Tax. Upon the hearing of the case, FINLAY, J. upheld the decision of the Special Commissioners and from this decision Fenton's Trustee appealed.

The facts and arguments are fully stated in the judgments of the Court.

Raymond Needham, K.C., and *F. H. Talbot* for the appellant.

Sir Donald Somervell, K.C., S.-G., and *Reginald P. Hills* for the respondents.

LORD WRIGHT, M.R. : The appellant is the surviving trustee of the estate of Henry Fenton, deceased, which is being administered under two deeds of arrangement. He claimed repayment of income tax for the years ending respectively Apr. 5, 1921, and Apr. 5, 1922, under Income Tax Act, 1918, s. 36., which is in the following terms :

> (1) Where interest payable in the United Kingdom on an advance from a bank carrying on a *bona fide* banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the satisfaction of the special commissioners, to repayment of tax on the amount of the interest

It will be convenient for the purposes of this judgment to deal only with the former period, which involves all the facts necessary to determine the question of principle involved. The facts are set out in the case stated by the Special Commissioners, and are in substance as follows. Henry Fenton had a total income for the relevant year of £26,301, computed in the manner provided by the Acts and taxed either by deduction or by direct assessment. Out of the income certain charges were paid, namely, £1,506 for ground rent and loan interest paid under deduction of tax, and £17,018 for bank interest on loan accounts with banks other than the bank mentioned below. This bank interest was paid without deduction of tax, and in respect of these interest payments claims for repayment of tax made under sect. 36 were admitted. That left a balance of income over these charges of £7,777. It was in respect of that sum that the claim for repayment of income tax now in dispute was made,

The case states that Fenton had borrowed various sums on loan account from the Halifax Commercial Banking Company, Limited, now Martins Bank Limited. The most important of these loan accounts, and the only one which need be considered here, is that called the Labrador account. The others are similar in character, and need not be individually discussed. In 1918 Fenton borrowed from the Bank £250,000 on the security of the Mingan Estate, Labrador. The case finds that up to the date of the hearing before the Special Commissioners nothing had been paid on that account in reduction of principal or interest, the charges, including the interest, having been debited each half year and added to the principal. In consequence of the addition to the debt of these sums from time to time, by June 30, 1921, the debit balance of the account stood at £302,973 2*s.* 8*d.* The bank certified that the amount charged as interest for the year 1920–1921 to the Labrador account was £22,402 4*s.* 7*d.* The certificate did not certify that any payment had been made. The account, headed "Labrador Account," which appears to be the account as kept by the Bank, shows at each half-yearly period the debit balance carried forward, then at the end of the period shows the charges (that is the interest) and cable expenses, which are added as further debits, and the increased balance is carried forward to the next half-year. The various accounts in respect of which interest was not only charged but paid were with banks other than the Halifax Bank. No question arises in regard to these accounts, claims for repayment under sect. 36 having been duly admitted. It does not appear in what form Fenton kept his accounts. There is nothing in the case stated to show what was done with the balance of income of £7,777, but it is not and could not be suggested that it was in fact employed in any sense in connection with the interest on the Labrador account.

The appellant claims to bring himself within sect. 36, on the ground that (1) he has paid interest in the United Kingdom on an advance from a bank without deduction of tax, and (2) that he has so paid the interest out of profit or gains brought into charge to tax. He does not claim repayment in respect of the whole £22,402 but only in respect of the £7,777: that is, the balance of income left after satisfying the interest due to the other banks. As to the residue, he concedes that it was not paid out of profit or gains brought into account. In regard to the first question, that is, whether the interest had been paid, it might at first sight appear that the interest has not been paid at all, but has been capitalised by being added as an accretion to the debt. It might appear proper to apply to this case the words of Russell, J., in *Re Jaunrey* (1) at p. 476, where he says "the interest is not capitalised because it is in fact paid, but because it has in fact not been paid." That was a case not involving accounts between banker and customer, but between

mortgagor and mortgagee. It has, however, been admitted and assumed for purposes of this case on all hands in this Court that the interest charges have been paid or are deemed to have been paid. In *Commissioners of Inland Revenue* v. *Holder* (2), this Court held that under sect. 36 where an account was kept between banker and customer in the same way as the Labrador account, the customer must, in the words of ROMER, L.J., at p. 560, " be deemed to have paid each half year the accruing interest by means of an advance made for that purpose by the bank to the company." ROMER, L.J., explained that such a method of keeping accounts was regulated not by any special agreement, but by the ordinary usage prevailing between bankers and customers; and he goes on to say that

> though an agreement for charging compound interest was illegal as being usurious it was not illegal for the parties to strike a balance at any particular time without any antecedent agreement to do so, and then agree that such balance should continue on loan at interest for a further period.

Where these were the circumstances this Court accordingly held that they should apply the view of LORD COWAN in *Reddie* v. *Williamson* (3). LORD COWAN said:

> The true view is that the periodical interest at the end of each year is a debt to be then paid, and which must be held to have been paid when placed to the debit of the account as an additional advance by the bank.

On appeal to the House of Lords, the decision was affirmed on other grounds, and their Lordships expressed no opinion on the question (as stated by LORD ATKIN) whether " by adding interest to the advance at the end of each half-yearly rest the interest is in fact paid." Accepting the authority of this decision, I shall proceed on the footing that the interest in question has been paid, or, as it is put, " deemed to be paid," within sect. 36 of the Act, though it may be noted that the words " deemed to be paid " do not appear in the section.

That leaves to be determined the second question, which has been strenuously argued on both sides, whether the payment of interest was " out of profits or gains brought into charge to tax." At first sight this might seem to involve a travesty of the facts, but it is contended on behalf of the appellant that if or to the extent that the taxpayer has paid for the relevant period tax on profits or gains he can avail himself of that payment to " cover " (that was the phrase used) for tax the bank interest and bring it within sect. 36 so as to found a claim for repayment of the tax under the section. This, it is admitted, can only be done to the extent that such profits and gains have not been in fact exhausted for the payment of other bank interest or similar charges; hence the claim is here limited to the balance left, the sum of £7,777, as to the disposal of which nothing is known except that no part of it was used or could

have been used to pay interest on the Labrador account. The decision of the Special Commissioners was that :

With regard to the Labrador Account and the other accounts where the interest has been debited to the loan account and that account has not been paid off, we hold that, even if the interest had in fact been paid, it was not paid out of profits and gains charged to income tax, but had been paid out of further advances from the bank in question. The claim in this respect fails.

With that decision Finlay, J., agreed.

A number of cases were cited as throwing light on the construction of sect. 36 so far as relevant to the question of issue. These were cases dealing with All Schedules Rules, rr, 19, 21. But these rules 19 and 21 do not apply to other than annual payment of interest and so forth, and hence it was necessary to have the further provisions now embodied in sect. 36 in order to deal with (*inter alia*) interest payable to banks on advances, on which the interest would not normally be due yearly but for half-yearly periods or other broken periods. Sect. 36 does not authorise or require tax to be deducted ; it assumes that payment is made without deduction of tax, and gives a right of repayment of the appropriate tax provided that the interest has been paid out of income brought into charge for tax. The principle involved is that the interest paid is to be deemed income, not of the payer, but of the recipient, and hence, if the payer has paid tax on it, he is entitled to repayment from the revenue authorities, who otherwise would be getting tax twice over for the same sum of interest from payer and recipient, whereas the tax is only due once, and is due from the recipient whose income it is deemed to be. But this reasoning does not apply if the money which the payer uses to pay the tax is capital or borrowed money and so forth which in his hands has never been brought into charge as income. Hence the two conditions which the section specified as necessary to a claim for repayment. The same principles are involved in rules 19 and 21, but in these rules provision is made for the tax being deducted by the payer when he pays the recipient, with the corresponding condition that if the interest is payable in whole or in part out of profits and gains not brought into charge, the payer is liable to account to the revenue for the tax so deducted, otherwise he is entitled to retain what he had deducted because he has already paid the tax himself. Hence questions have arisen under the rules 19 and 21 or under the corresponding provisions of earlier Revenue Acts, whether interest was " payable and was in fact paid wholly or in part out of profits and gains brought into charge." I quote the question as stated by Lord Buckmaster in *Birmingham Corporation* v. *Inland Revenue* (4) at p. 309. This and other cases, to some of which I shall refer, have been relied on by both sides as affording guidance for the construction of sect. 36.

The special case either finds as a fact or holds that in respect of the

sum in regard to which it is claimed that tax should be repaid there has been no payment of interest out of profits and gains brought into charge, but that the payment has been made out of further advances from the bank. The appellant, however, contends that on the facts set out in the case the contrary decision must be arrived at as a matter of law. The rule of law contended for, as I understand it, is that payments are in law to be treated as made out of the taxed fund (if I may for convenience use that expression to describe profits and gains brought into charge for tax), if there is any taxed fund which might have been used for the payment, however clear it may be that such taxed fund was not so used, but that the payment of interest was made from other sources, and was made in such shape as to be inconsistent with payment from any taxed fund. In other words, so the contention runs, the only relevant question in a case like the present is, were there for the relevant year profits and gains brought into charge which were available to be used for the interest payment or some part ? If so (subject only in the case of corporations to questions of *ultra vires* or illegality) no further enquiry into the facts is competent : the right to repayment of tax is *ipso facto* conclusively in law established, however contrary that conclusion may be to fact and evidence. The rule of law, it is contended, is that the availability of taxed income " covers " the interest, as far as the taxed income will go.

I have been unable to find any authority to justify this contention to the full extent claimed ; and there seem to me to be both dicta and at least one decision to the contary purport. It is true that it has been laid down more than once by the House of Lords that where there is what is called a mixed fund, consisting partly of taxed and partly of untaxed moneys, and the interest is paid out of that fund, without the source being earmarked or distinguished as between taxed and untaxed, the taxpayer is entitled to attribute the payment to the taxed moneys, so as to obtain the benefit of rule 19. The same must equally be true of sect. 36 ; that is, subject to questions of illegality. I am aware that the word " fund " or the word "moneys " is rather metaphorical than accurate in these days of credit dealings, where practically everything is matter of debits or credits in account ; and in particular " taxed fund " is inaccurate if it is applied to the balance of profits and gains computed for income tax : there is in truth no such fund ; there is merely a notional computation and an account. But the expressions are constantly used, are convenient, and do not really mislead. In the ordinary course, a person paying interest does not generally appropriate the payment to income or to any particular piece of income or any specific asset ; he has the general body of available funds ; say, his banking account, if he has only one, and he pays by drawings on that account, which may include income, borrowed money, capital and so forth. This is what is meant by payment out of a mixed fund, or

payments made out of the general till, or payments made neutrally. The revenue authorities have no right in such cases to appropriate those payments to non-taxable rather than taxable moneys. Hence the tax-payer is given the right of attribution in the way. most favourable to himself. It is presumed, in the absence of evidence to the contrary, that payments are made out of income. This right of attribution, as it has been called, has been frequently stated. I may quote the statement by Lord Atkinson in *Sugden* v. *Leeds Corporation* (5), at page 504 :

> In case a mixed fund be formed from two funds, out of either of which the interest and dividends charged with the tax may lawfully be paid, you are to assume, in the absence of evidence to the contrary, that they have been paid from that portion of the mixed fund out of which they should be paid in the due course of administration, which due course is this, " that annual charges should, in the first place, be paid out of annual income."

The words " in the absence of evidence to the contrary " are to be noted. I may also quote what was said by Lord Sumner in the *Birmingham Corporation* case (4) at page 318 ;

> Neither as a matter of handing over identical currency nor of making specific appropriations in the books beforehand has there been any actual payment of the interest out of profits, but the decisions, I think, clearly contemplate that a mere attribution *ex post facto*, as part of a contention as to their rights, will serve the Corporation's turn without even an ultimate attribution in their books.

Then the learned Lord goes on to decide in that case that the claim that the interest should have been paid out of profits already brought into charge, in view of the Housing Act in question, " neither squares with the statutory relations resulting from this Act, nor is consistent with any tolerable working of it." I need not refer further to the authorities. But the principle is well established that this right of attribution does not exist where, as in *Sugden's* case (5), though the payment of interest is made out of a mixed fund which includes both taxed and untaxed moneys, it is unlawful or *ultra vires* to use for such payment the taxed funds ; the payment can only be attributed to the taxed funds if or in so far as it is legitimate to use them for that purpose. In the *Birmingham* case (4), where the right of attribution to taxed funds was in part negative, Lord Sumner (at page 317) puts as the reason for his decision that it was " unlawful in the sense of being negative by the whole tenor of the Act, to retain the tax deducted." Lord Atkin, however, puts his decision on another ground. In this opinion it was lawful for the Corporation to pay the interest either out of the taxed or untaxed funds, but he found in the conduct of the Corporation proof that the interest was paid out of untaxed funds. The untaxed funds consisted of the subsidy paid by the Government to make up the deficiency on the housing scheme which was regulated by statute ; and Lord Atkin bases himself on the form of the accounts adopted, not as mere

accounting but as a matter of substance and as evidence of matters of fact inconsistent with the attribution. Thus, he says at page 320 :

> But in preparing the account for the subsidy under the regulations they return the amount required for interest as the full amount without deduction ; and they give no credit for and make no reference to the deduction. The account is prepared for the purpose of ascertaining the loss on the housing scheme, and in these circumstances it must, I think, be taken that the Corporation are representing that they are out of pocket the full amount of the interest, or, in other words, that they have no right to keep for themselves the income tax deducted. This can only be on the footing that they have, in fact, paid the interest out of their untaxed funds. I do not think that it is necessary to involve the principles of estoppel, even if the necessary conditions for an estoppel exist, as to which I say nothing. The effect of the form of the account, charging the gross amount of interest as an element of loss intended to result in receipt of a subsidy and followed by the actual receipt of the money based upon the representations contained in it, is to afford to my mind conclusive proof that the Corporation, in fact, paid the interest out of untaxed funds.

This method of reasoning is, in my opinion, inconsistent with there being any rule of law of the full amplitude for which the appellant contends. It imports an exception to the rule other than that of illegality or *ultra vires*. So also does another authority to which the Court have been referred, *Central London Railway* v. *Inland Revenue Commissioners* (6). The company there was authorised by its special Act to pay interest on debentures, if they so chose, out of capital. Part of the interest was taken out of capital account. It was contended that for purposes of rules 19 and 21 that part was still to be treated as paid out of income charged to tax, because it was legally competent for the company to pay it out of that income, and hence the company were entitled so to attribute the payment. This Court rejected that contention. ROMER, L.J., thus summed up his conclusion at page 345 :

> Where, not for the purposes of convenience or for the purposes of giving effect to the payer's own notions of account keeping—not for that purpose, not for the purpose of definitely deciding and recording the fact that a decision has been come to that a certain payment of interest is to be paid out of capital and not out of interest, then the account is not only of great importance, but, in the absence of evidence to the contrary, is conclusive upon the matter. In the present case, a company, not for the purposes of convenience, not for the purposes of indulging in some fancy idea as to the proper method of keeping accounts, has debited this particular payment of interest to capital for the purpose of making it clear that the revenue from which it might otherwise have been deducted is to be free for distribution as dividend.

The fact that the taxpayers were a corporation was not material, there was no question of illegality or *ultra vires*. It was simply in that case that the facts were inconsistent with and excluded a right of the taxpayer to attribute the payment to the taxed fund.

When I seek to apply to the present case the statements of principle which I have just quoted, I first of all find in them a negation of the

contention that there is any rule of law which compels the Court to hold that there is in all cases an absolute or universal right to attribute interest payments to income if there is any income available, save only in the case of illegality or *ultra vires*, or which compels the Court to upset the conclusion of the Special Commissioners here. There is no abstract right of attributing to the taxed fund interest payments merely because a taxed fund is available. The actual facts must in each case be examined: the payment must be neutral: the attribution must not be inconsistent with the evidence: the conduct of the taxpayer must not be inconsistent with the attribution. It is true that there is *prima facie* a right of the taxpayer to attribute the interest payments in the manner most advantageous to himself in relation to the revenue authorities. It is not necessary for him to show affirmatively that the payment of the interest was made out of a taxed fund, by appropriation, or as a matter of bookkeeping. But here there is much more than bookkeeping. The facts set out in the special case are only consistent with the idea, that the interest payments (or what were deemed to be payments) on the Labrador account were segregated specifically from the balance of taxed income, namely, £7,777, which was left after paying the interest on the accounts with the other banks. There was in that regard no mixed fund from which the interest could have been paid, and no payment neutrally made. The £7,777 was kept separate on the face of the account and the only inference possible is that it was deliberately kept separate not as bookkeeping, but in accordance with the fact that it was kept free for other purposes than payment of the Labrador account. Further, the interest on that account was paid in such a way that it could *pro tanto* not have been paid by means of the £7,777 or any part of that. The interest on the Labrador account was only paid (or deemed to be paid) by the particular method shown in the account, that is, by money borrowed by way of addition to the debt, and without any income being used to pay it. The appellant, in order to prove the payment, has to invoke the fiction by which what took place is recognised as payment. That fiction is inconsistent with taxed income having been applied to payment. The appellant cannot now turn round and seek to prove the second condition entitling him to repayment by revoking a general right of attributing the interest payments to drawings from the taxed fund when he has already established that they were not so paid. The two conceptions, or (as they may be called) fictions, would thus contradict each other. The appellant's manner of proving the interest payment has excluded the idea that it was made from a mixed fund or was neutrally made. In truth, if the method of payment is, for purposes of this case, accepted as payment, it necessarily involves that the money lent by the bank on each half-yearly rest to pay the interest was never available for any other purpose and was from its

nature dedicated to that payment and nothing else. By that payment and in no other way was the interest satisfied.

In my judgment, the decision of the Special Commissioners and of FINLAY, J., should be upheld and the appeal dismissed with costs.

ROMER, L.J.: The questions that have to be determined on this appeal are: (1) whether the sums of £27,136 3*s.* 2*d.* and £11,758 8*s.* 9*d.* charged against Henry Fenton as interest for the years ending Apr. 5, 1921, and Apr. 5, 1922, respectively, in his accounts with Martins Bank Limited and their predecessors in business were paid to them by Henry Fenton within the Income Tax Act, 1918, s. 36; (2) whether, if paid, they were paid as to the first year to the extent of £7,777 and as to the second year to the extent of £2,722 out of profits and gains brought into charge, so as to entitle the trustee of Henry Fenton to repayment of the tax on such last-mentioned sums under the section. Of these two questions the former was decided by FINLAY, J., in favour of the trustee, the learned Judge very properly considering himself bound by the decision of this Court in *Commissioners of Inland Revenue* v. *Holder* (2), to hold that the interest must be deemed to have been paid from time to time out of sums deemed to have been advanced by the bank to Henry Fenton for that purpose. We are also bound by that decision, to which in fact I was a party, and being so bound we must, as it seems to me, deal with the present case as though at each rest in the accounts, when interest was debited to Henry Fenton and added to capital, the bank made a loan to him of a sum equal to the interest charged and he returned such sum to the bank in discharge of that interest. That being so, the next question to be determined is whether the interest to the extent I have mentioned was paid out of profits or gains brought into charge. It would at first sight seem plain that the answer to this must be in the negative, for the interest was paid by returning to the bank the sum advanced by them for that purpose, and the sum so advanced was not brought into charge. The matter, however, cannot be disposed of quite so easily. It is true that the interest was paid, in the first instance, out of the sums advanced by the bank, but it by no means follows that it must not in the end be deemed to have been paid out of profits and gains brought into charge. In order to answer the question, it is necessary to look at some authorities in which the Courts have had to consider the meaning of the words "payable out of profits and gains brought into charge" to be found in rules 19 and 21 of the General Rules applicable to all Schedules in the Income Tax Act, 1918, and in the statutory predecessors of those enactments. In considering some of these authorities, it is not, I think, necessary to go back further than *Sugden* v. *Leeds Corporation* (5). LORD HALDANE said in that case at page 491:

> If the annual payments would properly have been payable out of profits, but the

person bound to make them has chosen to defray them out of some other source of income, this does not affect his right to retain the amount of tax he has deducted

and a little later

In each case the question is whether the annual payments taxed are actually or properly payable out of the profits. If they are these profits are treated by the Acts as diminished *pro tanto* in the hands of the owner, and he, having paid once for all on the whole, is then entitled to retain for his own benefit the amount of tax he deducts from the annual payment before making them, as being tax that he has already paid.

By the word "profits" in these passages Lord Haldane meant, of course, profits and gains brought into charge. Lord Atkinson in the same case, said this on page 498:

The profits and gains brought into charge may, for convenience, be styled the "taxed fund"; and all other resources of the debtor may be styled the "untaxed fund." The first important question to determine then is, what is the meaning of the words "not payable out of" this taxed fund? They cannot mean, I think, not charged upon the "taxed fund." Every professional man who has nothing but his professional income, or tradesman who has nothing but the profits of his trade to live on would be entitled to retain for his own benefit the tax he had deducted from an annuity he had contracted to pay if he had, in fact, paid it out of that income, or those profits, forming the "taxed fund," though the annuity were not specially charged on anything. This is, I think, according to the invariable practice. If, then, these words "not payable out of" do not mean "not charged upon," it appears to me they must mean "not legally payable out of," that is, which cannot lawfully be paid out of the "taxed fund."

If the interest or the annuities were in fact, but against the law, paid out of the "taxed fund," then, though the tax should be deducted from the creditor, it could not be retained by the debtor. He should account for it to the revenue. Of course, if the interest and annuities be charged upon the taxed fund they will almost necessarily be lawfully payable out of it. This fund might, however, not be charged as the primary security, or some condition might have to be fulfilled before it could be so applied, in which case payment out of it might be illegal till the first fund was exhausted, or the condition fulfilled. If this be the true view as to the meaning of these words "not payable out of," then the results of the application of the subsection would, according to the authorities, apparently be the following: (1) Where no portion of the interest or annuities charged with the tax could be lawfully paid out of the "taxed fund," the debtor, who on paying this interest or these annuities deducts the appropriate tax from his creditor or creditors, must account to the Commissioners of Inland Revenue for the full amount of the tax so deducted; (2) When only a portion of this interest or these annuities can lawfully be paid out of the "taxed fund" then the debtor, though bound to deduct the tax from his creditors on the full sums paid to them, is only bound to account to the revenue authorities for the amount of the tax deducted from that portion of the interest

or annuities actually paid out of this untaxed fund. The remainder of the entire sum deducted he is entitled to retain for his own benefit; (3) When the interest and annuities so charged may with equal legality be paid out of either the "taxed" or "untaxed" fund of the debtor, and the taxed fund is adequate in amount to pay them, it will not be necessary for the debtor, in order to entitle him to retain for his own benefit the entire sum deducted, that he should have in his books or otherwise specifically appropriated or set apart the taxed fund to discharge this interest or these annuities, or to prove that he had in fact paid them out of the "taxed fund." It will suffice, should the two funds be blended and formed into a mixed fund, that the interest and annuities charged should be paid out of this mixed fund. They will, if so paid, be treated as having been paid out of the taxed fund, especially where in the ordinary course of business it should be applied for that purpose. Later in his speech, when commenting upon the judgment of LORD DAVEY in the *London County Council* case (7), he added this (page 504):

> What it is an authority for is, I think, this: (1) that there is not to be any apportionment of rateability in favour of the Crown between two funds out of either of which the interest or annuities charged with the tax may lawfully be paid, and (2) that in case a mixed fund be formed from two funds, out of either of which the interest and dividends charged with the tax may lawfully be paid, you are to assume, in the absence of evidence to the contrary, that they have been paid from that portion of the mixed fund out of which they should be paid in the due course of administration, which due course is this, "that annual charges should, in the first place, be paid out of annual income."

I do not think that LORD ATKINSON in referring to a mixed fund intended in any way to differ from what LORD HALDANE had already said. As I read his judgment the remarks that I have cited were intended to apply to whatever fund may have been resorted to in the first instance for discharging the annual payment. In most cases the interest or annuity would no doubt be met by a cheque, and in this way paid out of the balance standing to the payer's credit with the bankers, and such balance would in many cases be a mixed fund resulting from the payment into the banking account of moneys derived from various sources, both of revenue and capital. Sometimes, however, the payment would be made out of cash in hand or some other fund representing capital alone. But whatever may have been the source from which the annual payment has been made in the first instance, if such payment could lawfully have been made out of profits and gains brought into charge, it is to be assumed in the final adjustment of accounts, and in the absence of evidence to the contrary, that it has been made out of such profits and gains. The assets of a company, for instance, where no particular appropriation has been made, constitute, as a rule, a mixed fund representing indiscriminately the balance of its capital (whether derived from shares or loans) the money required to discharge its unsecured liabilities, its reserve funds,

its receipts on revenue account, and so forth. If in the course of the year a payment falls to be made whether in discharge of a capital or a revenue liability, it can be made in the first instance out of any particular asset regardless of what that asset may be. But in drawing up the balance sheet at the end of the company's trading year, such payment will be charged to the appropriate item on the debit side of the balance sheet, and in this sense will be properly described as having been made out of capital or reserve or profits and gains, as the case may be. In the case last put by Lord Atkinson the interest and dividends would be charged against the company's profits and gains, and in that sense can properly be said to have been paid out of the fund representing profits and gains brought into charge. This, however, can only be done where the profits and gains can properly be applied in discharge of the payment, and where the company has not elected to charge them against some other fund, that is to say, some other debit item such as capital or reserve. In the latter case the assumption mentioned by Lord Atkinson will not be made. The company's election will constitute the evidence to the contrary to which he refers. The authorities cited to us furnish many examples of cases where profits and gains or some particular portion of the profits and gains brought into charge could not properly be resorted to in discharging interest on a particular loan, and the assumption could not be made that the interest had been paid out of them. *Sugden* v. *Leeds Corporation* (5) was itself one of them. *Birmingham Corporation* v. *Inland Revenue Commissioners* (4), and *Dickson* v. *Hampstead Borough Council* (8), are others. In the three cases, however, of the *Central London Railway*, the *London Electric Railway* and the *Metropolitan Railway* respectively v. *Inland Revenue Commissioners* (6), the interest that was there in question could properly have been made out of the profits and gains brought into charge. It was held in this Court, however, that the companies had deliberately elected to charge the interest against capital, as they had power to do, and had thereby furnished such evidence to the contrary as would prevent Lord Atkinson's assumption being made.

Now, in the present case Fenton's profits and gains brought into charge could without any question have been properly applied in or towards discharge of the Bank interest. The only question, therefore, to be decided is whether Fenton must be deemed to have elected that the interest should nevertheless be charged ultimately against the sums advanced to him from time to time by the Bank. I use the words "deemed to have elected" purposely, for it is extremely improbable that he ever consciously directed his mind to the question. In all probability all that he knew was that the Bank added the interest half-yearly to the principal sum, and thereafter charged interest upon the aggregate amount. For all that he knew, therefore, the interest was not

paid at all. The interest can only be treated as having been paid by assuming that he borrowed money from the Bank and discharged the interest out of that money. The whole thing, as FINLAY, J., said is very artificial. It is indeed wholly imaginary. But if we are to enter into the realms of the imagination for the purpose of solving one part of the problem before us, we must, as it seems to me, remain there until we have solved the problem as a whole. We have, therefore, to imagine that Fenton approached the Bank and induced them to lend him half-yearly a sum equal to the interest that had accrued due on the terms that that sum should be added to and for all purposes become part of the principal money advanced, and that he then returned that sum to the Bank in discharge of the interest. The fact that an annual payment is made for convenience out of borrowed money would not, as a rule, prevent the payment from being charged ultimately against profits and gains brought into charge. But where, as here, we have to imagine that the interest is paid not out of a sum borrowed independently for general purposes, but out of money borrowed for the express purpose of paying the interest and of the precise amount of the interest and on the terms that it shall form part for all purposes of the principal amount due, and that this was not done merely on one occasion, but whenever interest fell due, then I think that we must further imagine that Fenton elected that on a final adjustment of accounts the interest should be charged against the money so borrowed, and elected that it should not be charged against profits and gains brought into charge.

For these reasons, which are in substance those given by FINLAY, J., I am of opinion that this appeal fails.

GREENE, L.J.: I regret to find myself in disagreement with the other members of the Court.

The general scheme of the Income Tax Act with regard to interest is one which, as was pointed out by SWINFEN EADY, M.R., in *Earl Howe* v. *Inland Revenue Commissioners* (9), at page 344, avoid subjecting the same income to double taxation. In the case of annual interest the machinery by which this is achieved so far as regards income tax, involves: (*a*) the prohibition of any deduction on account of annual interest in computing the taxable income of the payer (Income Tax Act, 1918, s. 209 (1) (*b*)); (*b*) the right of the payer when he pays the interest to deduct and retain the tax paid (General Rule 19 (1)); (*c*) the exclusion of interest received in computing the taxable income of the recipient. For the purposes of surtax, on the other hand, the payer is entitled to deduct the interest paid, whereas the recipient is bound to include it in arriving at his total income. In effect, both in the case of income tax and in the case of surtax, the interest is treated as part of the income of the recipient, the provisions, in the case of income tax above referred to, being merely machinery. It is obvious that this method of dealing

with interest is only suitable where the interest paid is referable to taxable income of the payer. If, for example, a person has no taxable income, but has paid interest, the result of excluding the interest from the taxable income of the recipient and permitting the payer to deduct and retain the tax would be that the interest would escape taxation altogether and accordingly provision is made that these provisions are only to apply where the interest is payable (and paid) wholly "out of profits or gains brought into charge to tax." Where the interest is not wholly so payable and paid the payer is bound to deduct a sum representing the tax and is accountable to the Crown for the whole or part of the amount so deducted as the case may be (General Rule 21). These provisions have been held to apply to a case where the assessable income for the year in which payments of interest were made (ascertained by reference to the previous year) was nil, although the actual profits for the year of assessment (on which the assessment for the following year would in due course be based) amounted to a sum greater than the interest paid (*A.-G.* v. *Metropolitan Water Board* (10)), a decision which, in my judgment, has a very important bearing on the present case.

Previously to the passing of the Finance Act, 1915 the scheme outlined above did not apply to interest on "short loans" with the result that : (*a*) as in the case of annual interest, the payer was assessed on his gross profits without any deduction of interest paid ; (*b*) he was not entitled to deduct tax on paying the interest ; (*c*) the recipient was bound to include the interest which he received for the purpose of calculating his taxable income. This result was an anomalous one. There does not appear to be any difference in principle between annual interest and interest on short loans ; in each case the interest paid may be regarded as part of the income of the payer transferred to the recipient as distinguished from a mere expenditure of income by the payer. Nevertheless, the result was that the Crown received income tax twice in respect of the interest, once from the payer inasmuch as he was taxed on his gross profits, and once from the recipient in that the sums received had to be brought into account in ascertaining his taxable income. There was, however, this difference, that in the case of banks, at any rate (and I assume that the same applies to stockbrokers and discount houses), the interest received was not taxed as such in their hands, but was treated (as it still is) as a receipt in ascertaining the balance of profits of their business.

The anomaly was removed so far as regards banks by the Finance Act, 1915, and as regards members of Stock Exchanges and discount houses by the Finance Act, 1917, and the relevant provisions of those Acts are now incorporated in the Income Tax Act, 1918, s. 36. In substance the position with regard to interest on short loans is assimilated to that of

annual interest. The machinery, however, is different since in view of the difference of treatment of the interest in the hands of the recipient to which I have referred, it would have been inconvenient to allow the payer to deduct the tax. The desired result is accordingly achieved by allowing the payer, on proof of the facts being given, to obtain repayment of tax on the amount of interest paid. By this means double taxation is avoided in the case of interest on short loans as it was already avoided in the case of annual interest and it is, I think, fair to conclude that this was one of the objects, if not the only object, of the amendments in the law so made. The position of the Crown is safeguarded against the escape of interest from taxation by providing that repayment is only to be made where the interest is "paid . . . out of profits or gains brought into charge to tax," and it is upon the effect of those words as applied to the facts of the present case that the question to be decided upon this appeal turns.

In construing these words, it is, I think, legitimate to bear in mind that (to say the least) one important object at which the legislature was aiming throughout the provisions of the Income Tax Act, which deal with interest, was to ensure that the Crown should obtain tax once, but only once, in respect of interest. I do not mean by this that the words used are to be misconstrued for the purpose of avoiding double taxation. If the words when properly construed lead to that result, it must, of course, be taken that the legislature so intended the words "paid out of profits or gains brought into charge" in sect. 36, are, for all practical purposes, the same as those used in General Rules 19 and 21, and accordingly the contentions of the respondents with regard to their construction will, if correct, apply equally to the case of annual interest and this position was accepted by counsel on their behalf.

I need not recapitulate the facts of this case, which have already been fully stated. In my opinion, upon the authority of the decision of this Court in *Holder's* case (2), the interest in question was "paid." In that case this Court examined the practice of bankers with regard to capitalising interest, a practice which was followed in the present case, and ROMER, L.J., said at page 560 that "the company must be deemed to have paid each half-year the accruing interest by means of an advance made for that purpose by the bank to the company." The learned Solicitor-General argued that this phrase means something less than that the interest was paid. I do not so read it. It seems to me that what this Court was doing in that case was to ascertain from the conduct of the parties the true nature of the contract between them and that this was that the interest as it accrued due was to be satisfied by a fresh loan made by the Bank for the purpose. On this basis, there cannot, I think, be any doubt that, in the present case, the interest was paid within the meaning of sect. 36. Nor is there any doubt on the facts that the

interest was paid by means of an advance made for the purpose by the Bank. The learned Solicitor-General argued that this was conclusive of the present question upon the ground that interest paid by means of an advance made by the Bank for the purpose could not be said to have been paid "out of profits or gains brought into charge." This is the the point of view accepted by the Special Commissioners in their finding that "even if the interest had in fact been paid, it was not paid out of profits and gains charged to income tax, but had been paid out of further advances from the Bank." I now proceed to give my reasons for thinking that this finding cannot be supported. The finding evidently assumes that if interest is "paid out of" money obtained on loan from the Bank it cannot be said to have been "paid out of" profits and gains charged to tax, and the learned Solicitor-General agreed, as I think his argument compelled him to agree, that even if the money required to pay the interest had been borrowed from a third person and had been used to pay the Bank the taxpayer would not have been entitled to claim repayment of the tax. In my opinion, the fact that interest is paid by means of money borrowed for the purpose is in no way incompatible with its having been paid out of profits and gains brought into charge. Profits and gains brought into charge are in truth not an asset in the sense that money obtained by borrowing is an asset. They are in effect a balance of profits and gains ascertained upon the taking of an account. If the case be taken of a trade or business the balance of profits or gains in respect of which the taxpayer is assessable is arrived at after taking an account of receipts and expenditure in accordance with the provisions of the law relating to income tax. This account is not necessarily the same as the trader's own profit and loss account, nor is the balance of assessable profit necessarily the same as the balance on the profit and loss account, since the deductions which are permissible under the Income Tax Acts are in general different, both in scope and in amount, from those which the trader would normally take into account in arriving at his profits for his own purposes. Moreover, in the account taken for the purposes of income tax, interest on borrowed money will not anywhere appear, since it is not a permissible deduction. The balance of profits or gains, therefore, which is ascertained for income tax purposes, is an accountancy figure arrived at in a particular way. It is not represented by any actual sum of money or other specific asset and has no existence otherwise than as a balancing item whose proper place is on the expenditure side of the account. In this respect it resembles the balance of profit appearing in a trader's own profit and loss account.

The impossibility of regarding "profits or gains brought into charge to tax" as something "out of" which interest can be "paid" in any concrete or tangible sense is further illustrated by the fact that in the case, for example, of assessments under Schedule D the amount of

the " profits or gains " in respect of which the tax is chargeable is not the actual amount of the profits or gains for the year but a notional amount ascertained by reference to the preceding year. Thus if a trader in the year 1 makes no assessable profits, in the year 2 makes £1,000 assessable profit, and in the year 3 again makes no assessable profit, but in each of the three years pays £50 in interest, the interest which he pays in the year 2 is not, according to the decision in the *Metropolitan Water Board* case (10), paid out of profits or gains since for that year there are none in the income tax sense, although in fact he has made a profit of £1,000. But what of the year 3 ? In that year his income tax profits or gains are £1,000, his real profit is nil. Now, if it be supposed that he has no other source of income, the only way in which he can pay his interest is by realising capital or borrowing. But according to the Crown's argument, if he used the money so raised to pay the interest, he would not be paying it " out of profits or gains brought into charge to tax." It would appear, therefore, that the provisions of rule 19 and sect. 36 are of no assistance to him in such a case, and although he has £1,000 income tax profits or gains for the year, it is impossible for him to " pay " the interest " out of " them. In what sense, therefore, can it be said that interest is " paid out of " profits or gains ? A borrower pays his interest out of any money available. His balance at the bank at the time when he draws his cheque may consist of money derived from a variety of sources—receipts of his business, realisation of capital assets, borrowed money, etc. Indeed, he may have no balance and payment may be made out of an overdraft on current account or an advance on loan account. It is only when he comes to make up his accounts for the year (assuming that he does so) that the payment of interest appears (if he so elects to treat it) as a payment on revenue account. But the fact that it so appears or ought to appear or does not appear in his private accounts, in my judgment, has no relevance to the question whether or not the interest is " paid out of profits or gains charged to tax " since such accounts bind neither the Crown nor the tax-payer. The source of the money which he pays in interest has no bearing on the question as to how the payment is to appear in his accounts if and when they are drawn up ; and it is to my mind impossible to say that the application of rule 19 and sect. 36 depends on whether or not in his own private accounts made out (or deemed to have been made out) for his own private purposes he chooses at the end of the year to charge the sum which he has paid by cheque drawn on his banking account to capital or to revenue. I take the view that a taxpayer who for the purposes of his own private accounts has charged payment of interest to capital, is entitled, when he comes to the income tax authorities for assessment, to treat the payment as a charge against profits up to the amount of his assessable profits, and that he is not in any way precluded from doing this by the manner

in which he has chosen to keep his private accounts. Those accounts are kept for one purpose; the accounts made out for income tax are made out for a wholly different purpose. A debtor who is minded to pay his interest out of income does not in his private accounts show the interest as "paid out" of his profits; he strikes his balance of profits after and not before charging interest. In the accounts made out for income tax purposes no corresponding treatment of interest is possible, since, as I have already pointed out, interest is not an item which can ever appear in those accounts. Finally, in cases where tax is assessed on the basis of the profits of the preceding year, there is no possible comparison between the two accounts; the private accounts for the year in which the interest is paid reflect the real transactions for that year, the accounts for purposes of income tax show transactions which, so far as that year is concerned, are notional; and I am quite unable to see how a taxpayer who in his private accounts for the year in which the interest is really paid has charged the interest to capital can in any way be thereby prevented *vis-a-vis* the revenue from treating the interest as "paid out of" the notional profits for that year. But if this view is incorrect, it is sufficient to point out that in the present case there is no evidence as to the way in which the tax-payer's private accounts were kept, so that there can be no question of any binding election on his part to charge the interest paid to capital.

In the course of the argument I asked Mr. Hills what a trader must do in order that he may bring himself within the provisions of rule 19 or sect. 36, out of what tangible assets must he pay the interest? Mr. Hills found himself unable to answer this question, nor do I think that upon the Crown's argument, it is susceptible of any intelligible answer. In truth, in my judgment, which I express with all respect, the argument of the Crown and the finding of the Commissioners are based upon a confusion between the two sides of an account and the two senses in which the words "paid out of" may be used. A company which decides to "pay" its debenture interest "out of" its reserve account may obtain the actual cash required for the payment by means of a bank loan, in which case it is true to say that it "pays" the interest "out of" moneys borrowed for the purpose. But the words "pay" and "out of" are here used in two quite different senses. In the latter expression they refer to the asset used to make the payment, in the former to the item (which from the accountancy point of view is a liability) against which the payment is charged in the company's accounts. In order to give effect to the decision to "pay out of" the reserve account all that has to be done is to write down that account by the amount paid. The transaction would be reflected in the company's balance sheet: (1) by an entry of the amount of the loan on the liability side; (2) by a reduction in the reserve account by a corresponding amount. There would be no

increase on the asset side to represent the cash borrowed since that cash has been used to pay the interest.

These considerations are no doubt elementary, but they are apt to be overlooked, and as I think, with all respect, that in the present case they have been overlooked by the Special Commissioners, I have thought it desirable to refer to them. In my opinion, the only intelligible and consistent meaning which can be given to the words " paid out of profits or gains brought into charge to tax " is one which (subject to certain excepti ns in special cases) makes them apply where the amount of interest paid does not exceed the figure of profits or gains as ascertained for income tax purposes for the year in question. Subject again to the same exceptions the actual source of the cash by means of which the interest is paid—a source which may be selected for quite irrelevant and fortuitous reasons—is immaterial.

What I have said above is, I think, entirely consistent with the decisions upon this topic. I do not propose to refer to them in detail. In *Central London Railway* v. *Inland Revenue Commissioners* (6), at pages 341 to 342, LORD HANWORTH, M.R., sums them up and states the rule to be deduced from them as follows :

> These cases, to my mind, make it perfectly clear that, in the ordinary course where there is a mixed fund, but where there is an abundance of funds brought into charge, the ordinary appropriation should be deemed to take place, namely, that the subject has paid the money which he has paid out of the available fund which has been already brought into charge and that he is entitled, therefore, to retain the sum which he has deducted from the sum paid over to the annuitant in his own hands ; that would be what might be called the " rule of the road."

The exceptions to this rule are based upon easily intelligible principles. LORD SUMNER in *Birmingham Corporation* v. *Inland Revenue Commissioners* (4), at page 314, says this :

> A series of decisions in your Lordships' House has laid down, not it is true in any case precisely the same as this, the conditions under which payments neutrally made, in fact, may be deemed to have been so made for income tax purposes and the effect of this assumption upon the disposal of the sums deducted from the payments of interest. I will spare your Lordships any citation of them, but they lay down a limitation on the right to do this, depending on its being lawful or legitimate to have made the payments out of such chargeable profits, if this had actually been done.

If it is not lawful or legitimate to charge against the profits in respect of which the relevant account is drawn up for income tax purposes a particular item of expenditure upon interest clearly, it cannot be said that the interest has been " paid out of profits or gains charged to tax."

Another example of the same principle applied to different facts is to be found in the *Central London Railway* case (6) already referred to. It is to be observed that all these special cases (with the possible exception of the *Central London Railway* case (6)) are cases of corporations

whose dealings with their money and their accounts were subject to special statutory provisions which had the effect of making it "not lawful or legitimate" to follow the ordinary rule. In the *Central London Railway* case (6) the action of the company in charging interest to capital had the effect of setting free a fund for dividend purposes and it was held that after this election had been made it would have been improper to charge the interest to revenue, a consideration which does not arise where the tax-payer is an individual. In my opinion, the principles upon which these exceptions are based have no application in the case of an individual. He can obtain the money required to pay his interest from any source he pleases. He is not bound to keep accounts. If he does so he can charge the payment to capital or revenue as he pleases and he can at any time write back to revenue account an item which he has charged to capital and *vice versa*.

In conclusion I may point out that if the Crown's contention be right, tax will be paid twice in respect of the same interest, once by the tax-payer and once by the bank, which will be bound to bring the interest received into account in arriving at its profits. It is, of course, the fact that in the case of short loans this double taxation may often take place. If the borrower has no profits or gains "out of" which the interest can be "paid," he is not entitled to recover any tax. Where, however, there are profits or gains of the borrower, if he is to be charged with tax on the full amount thereof without any right of recovery, double taxation takes place in a manifest and unjust form. Moreover, the Crown's argument also leads to double taxation in the case of annual interest. If, as the Crown contends, a debtor who pays annual interest out of borrowed moneys cannot claim to have paid it out of profits or gains brought into charge, the result, if both payer and recipient are assessable to surtax, will be that the recipient must include the interest in his return of total income for surtax purposes, while the payer will not be entitled in his return to deduct it.

For these reasons, and upon the basis that the transactions with the Bank with regard to the interest amounted to a payment of interest effected out of moneys borrowed from the Bank for the purpose, I am of opinion that the sum in question in this case was up to the amount claimed "paid out of" profits or gains charged to tax, notwithstanding that it was also, but in a different sense, "paid out of" moneys borrowed from the Bank for the purpose.

Appeal dismissed with costs.

Solicitors: *Blundell Baker & Co.*, agents for *Mumfords & Gordons*, Bradford (for the appellant); *The Solicitor of the Inland Revenue* (for the respondents).

[*Reported by* Philip F. Skottowe, Esq., *Barrister-at-Law.*]

HASELDINE *v.* WINSTANLEY.

[KING'S BENCH DIVISION (Horridge, J.), **February 6, 1936**]

Bills of exchange—Requirements of form—No drawee specified—Addition with consent of drawer—Material alteration—Treated as promissory note—Bills of Exchange Act, 1882 (*c.* 61) *ss.* 20 (1), 64 (1).

M. fraudently obtained the defendant's acceptance of two bills of exchange, which did not contain the name of any addressee. The plaintiff at M.'s request undertook to ask his bank to discount the bills and M.'s name was by mistake inserted by the plaintiff as addressee. The bank refused to discount the bills, whereupon the plaintiff agreed to do so himself, and with M.'s consent and in M.'s presence the addressee's name was altered to that of the defendant. In an action by the plaintiff claiming to be the holder for value in due course of the two bills of exchange, or alternatively on the documents as promissory notes :—

HELD : (i) the filling in of the defendant's name was a proper alteration within the Bills of Exchange Act, 1882, s. 20 (1) and made the documents good bills of exchange.

(i) alternatively the alteration was not a material one within sect. 64 (1) of that Act and did not affect the documents as good promissory notes.

[**EDITORIAL NOTE.** The question in this case turns upon the indication with sufficient certainty of the drawee of a bill of exchange. The bill here as first produced had no name inserted as drawee, and after having one inserted, the name was altered to that of a different person. This raised questions of materiality of alteration and whether the bill could be treated as a promissory note. This point has not been litigated since the passing of the Bills of Exchange Act, 1882, save for the case of *Mason* v. *Lack* (1929) 140 L.T. 696, which touches upon the promissory note point.

AS TO THE NECESSITY FOR CERTAINTY AS TO DRAWEE, see HALSBURY, 2nd Edn., Vol. 2, p. 617, para. 844, and FOR CASES, see DIGEST, Vol. 6, pp. 36, 37, Nos. 251-257.]

Cases referred to :

(1) *Mason* v. *Lack* (1929) 140 L.T. 696; Digest Supp.

(2) *Reynolds* v. *Peto* (1854) 9 Exch. 410; 6 Digest 35, *240.*

ACTION by the holder for value in due course of two bills of exchange against acceptor-drawee.

One, M. H. Morris, drew on July 1, 1935, two bills of exchange for £1,000 and £500 respectively, payable ninety days after date. He obtained acceptance by the defendant, Major Richard Winstanley, of both bills by fraud, he being an undischarged bankrupt. Next day he took the two bills to the plaintiff, Percy Haseldine, and asked him to get them discounted by the plaintiff's bank. The plaintiff consented, and as the bills were then not addressed to any person, the plaintiff entered on them (by mistake) the name and address of Morris as addressee, and left them with his bank to be discounted. On July 4 the bank refused to discount the bills on the ground that it was not satisfied with the financial position of the defendant. Morris then asked the plaintiff to discount the bills for him. The plaintiff agreed to do so, and, in

Morris's presence and with his consent, struck out the name and address of Morris and inserted those of the defendant. The plaintiff had no notice that the bills were affected by fraud. In due course the plaintiff presented the bills to the defendant as acceptor and drawee. and the defendant refused to honour them.

The plaintiff then brought an action as holder of the bills for value in due course, without notice of fraud. The defendant pleaded that the documents, when he accepted them, were not bills of exchange; that the plaintiff was never the holder for value in due course; that he knew the documents were irregular on their face in that, after the defendant's acceptance had been obtained by fraud, each document was altered in material particulars, with the defendant's knowledge and in fraud of him, by erasing Morris's name as drawee and substituting that of the defendant. He further alleged that the plaintiff knew that Morris was an undischarged bankrupt; and said that he himself had received no consideration for his acceptances or the documents.

The plaintiff, in his amended reply, made an alternative claim on the documents as promissory notes.

McCaskie, K.C., and *J. P. Eddy* for the plaintiff.

J. M. Tucker, K.C., and *R. A. L. Willes* for the defendant.

Horridge, J.: This action is brought to recover a sum of £1,000 and another of £500 on two documents. I use the word "documents" for the moment as a non-committal word. In 1935 one Morris obtained the signature of the forms of acceptance on those two documents from the defendant. At that time the documents were not addressed at all to any person. They were brought by Morris to the present plaintiff. and the present plaintiff filled them up with the name of Morris as the addressee. The documents were then taken to the bank by Mr. Haseldine, the plaintiff, and the bank was requested to discount them. The bank refused to discount them, not on the ground that the documents were informal in any way, but on the ground that the bank did not think the defendant was as well off as it had been told he was. Morris then asked the plaintiff to discount the documents for him, and before the documents were discounted the plaintiff, with the consent of Morris, altered the name of the addressee of the documents to that of Major Winstanley, the defendant.

It is clear to my mind that the documents, as originally produced, were not regular bills of exchange, because under the Bills of Exchange Act, 1882, s. 6 (1):

> The drawee must be named or otherwise indicated in a bill with reasonable certainty.

But it has not been disputed that the documents as then presented were good promissory notes; except for one thing: it is said that they are not good promissory notes because they bore Morris's name as the addressee at that time.

The first point with which I have to deal is whether or not, at the time that the documents were issued, they were good bills of exchange. I think they were. I think this point is covered by the Bills of Exchange Act, 1882, s. 20 (1). That subsect. says :

> Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser ; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit.

In this case the person holding the documents at the moment was Morris, because he had not then had the alteration made. Mr. Haseldine, with his (Morris's) approval, made the alteration and put in the name of Major Winstanley as the addressee, or acceptor. In my view that made the documents good bills of exchange, on which he could be sued.

But supposing that they were not good bills of exchange, and I am wrong in that, they would in my view be good promissory notes. That seems to me to be decided by a case which was heard before HUMPHREYS, J. (*Mason* v. *Lack* (1)). That judgment is founded very largely on the earlier case of *Reynolds* v. *Peto* (2). It is not really disputed that they were good promissory notes, but it is said that they had been altered in material particulars, and sect. 64 (1) is relied upon on this contention :

> Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself made, authorised or assented to the alteration.

It seems to me that in this case there was no material alteration. If the alteration was material and made them into good bills of exchange, then the first ground of my decision is right, and there is no occasion to consider them as promissory notes. But if by any chance I am wrong on that, then the alteration. by putting the name of an addressee into the documents, did not affect them in any way as promissory notes, and had nothing to do with any liability on them as promissory notes. I think either that the plaintiff is bound to recover on the ground that he was justified in altering the documents by putting in the name of the defendant ; or, if I am wrong in that, then I think they were good promissory notes, and he is entitled to recover on them as such. There must be judgment for him for £1,518 15*s*., the sum stated in the documents, together with interest from Oct. 3 until to-day at the rate of 5 per cent.

I would also give two other findings of fact. I find that Mr. Haseldine was a *bona fide* holder for value and took the documents without notice ; and I also find that the acceptances were obtained from Major Winstanley by fraud.

Judgment for £1,518 15*s*. *and costs on the usual undertaking until the hearing of the appeal. Stay of execution for fourteen days granted, to*

consider points of law, on condition that the money be paid into Court after that period.

Solicitors : *Percy Haseldine & Co.* (for the plaintiff) ; *Neish, Howell & Haldane* (for the defendant).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

JENSEN *v.* HOLLIS BROS. & COMPANY, LIMITED.

[King's Bench Division (Branson, J.), **February 3, 4, 1936.**]

Shipping—Charter-party—Construction—"Expected ready to load"—Impossible date.

By a charter-party, dated Aug. 30, 1934, the plaintiffs agreed to load certain timber at the "end of August, 1934." There was an option to cancel the charter-party if a vessel was not ready to load on or before Sept. 20, 1934. The vessel was, in fact, ready for loading on Sept. 27, 1934:—

Held : as the date of the charter-party was practically the same as the date when the vessel was "expected ready to load," the parties could not have intended the vessel to load at that time, and the whole document must be looked at to arrive at the proper construction of the charter party. Having regard to the cancellation clause the proper construction was : "Expected ready to load on or before Sept. 27, 1934."

[EDITORIAL NOTE. Modern ships, it is said, run with the punctuality of railway trains and except for clearly unavoidable delays, it is now rather the rule than the exception that damages for delay can be recovered. At one time it was a well-known exception, see *Dunn* v. *Bucknall Bros.*, *Dunn* v. *Currie* [1902] 2 K.B. 614, 41 Digest 410, *2552.* In this case though delay was complained of, the real question was the construction of the charter-party which curiously enough stipulated that the ship was expected ready to load practically before the date of the document.

As to Readiness to Load, see HALSBURY, Vol. 26, p. 184, para. 274, and DIGEST, Vol. 41, pp. 447-451, Nos. 2804-2826.]

Case referred to :

(1) *Dunn* v. *Bucknall Bros.*, *Dunn* v. *Currie* [1902] 2 K.B. 614 ; 41 Digest 410, *2552.*

Action for £337 8*s.* 9*d.* balance of freight, discharging costs and dock dues under a charter-party dated Aug. 30, 1934. The defendants denied that plaintiff was entitled under that charter-party which they alleged was never performed by the plaintiff. By the said charter-party the plaintiff agreed to load 580 standards of firwood at Pernau and Riga, ready to load at the end of Aug., 1934, the charterer had the option to cancel the same if a vessel was not ready to load on or before Sept. 20, 1934. On Sept. 12, 1934, the plaintiff declared the steamship "Marta" to perfom the said charter-party and on the same date informed the

defendants that the "Marta" would be ready to load on Sept. 20, 1934. The defendants alleged that in breach of the said charter-party the "Marta" was not a steamship ready to load about the end of Aug., 1934, and did not in fact reach Pernau until Sept. 27. The cargo was in fact loaded on the "Marta" under bills of lading dated Oct., 1934, and these bills purported to incorporate all the terms of the charter-party dated Sept. 12, 1934. The "Marta" arrived at her discharging port on Oct. 15, 1934, and the defendants alleged that by reason of the failure of the plaintiff to perform the charter-party of Aug. 30, 1934, they had suffered damage as the result of the fall in market prices in this country between Sept. 30 and Oct. 15, 1934, and counterclaimed for the sum of £427 16*s.* 3*d.*

The plaintiff, in his reply, alleged that the damages were too remote, and in the alternative alleged that on Sept. 7, 1934, he declared the steamship "Kotka" to perform the said charter-party and informed the defendants to be ready to load on Sept. 14, 1934, but in breach of the charter-party the defendants refused to accept the vessel on the ground that they were unable to provide a cargo for that vessel before Sept. 18, 1934. The plaintiff therefore alleged that the defendants waived, as regards any vessel subsequently declared, the requirement that such vessel should be a vessel expected ready to load at the end of Aug., 1934, and/or were precluded from claiming damages for breach of warranty or representation as to the expected readiness to load of any vessel nominated under the said charter-party. The plaintiff paid into Court the sum of £2 with a denial of liability.

W. Lennox McNair for the plaintiff.

G. St. C. Pilcher for the defendants.

BRANSON, J. [His Lordship referred to the facts as set out above]: The facts are a little peculiar. The charter-party of Aug. 30, 1934, provides that the plaintiff shall declare a ship later expected and ready to load about the end of Aug., 1934, and also agrees that the ship is to go to Pernau and Riga and there load a cargo of 580 standards of firwood. Clause 3 (*b*) sets out the time for loading which is not to be before the end of August and the charterer is to have the right to cancel if the ship is not ready to load before Sept. 20. This provision was odd in a charter-party which was only entered into on the last day of August but one. If parties will enter into such contracts as these then all one can do is to consider the document as it stands as a whole. Clause 8 states that a steamer is to be named by the plaintiff to perform the charter-party. On Sept. 7, 1934, plaintiff gave a notice to the charterer's agent at Riga in the following terms: "We hereby give you notice that the steamer 'Kotka' is ready to load and request you to have your cargo ready to load by Sept. 14, 1934." The shippers were entitled to give 10 days' notice and the agents for defen-

dants took up the same attitude about the 10 days' notice. The plaintiff's agent told me that when he gave the notice he had no intention of declaring the "Kotka," but he could have put the steamer "Immarta" to do the voyage if the shippers had not objected and she would have been ready to load at the proper time, but in view of the objection he let the "Immarta" go and he, on Sept. 12, declared the "Marta" to perform the charter-party. The defendants then inquired when she could be expected to load, and was told she would be ready on Sept. 20, but nobody could have expected this, and in fact she did not arrive until Sept. 27. In the meantime, on Sept. 18, the defendant wrote to plaintiff's agent cancelling the date, but defendants never exercised their option to cancel. The ship arrived at Riga on Sept. 27, and went to the other loading port at Pernau, and arrived in this country on Oct. 15. On these facts the defendants allege that the charter-party was never performed. They say it was a breach of contract not to declare a ship ready to load by the end of August. There was a further breach in that the ship did not reach her loading port by Sept. 20, and they have suffered damage owing to the fall in market prices.

The first part of the case arises on the construction of the words in the charter-party "expected ready to load before end of August," which must ordinarily mean somewhere in neighbourhood of the end of August, but here it must mean some time in September. How could the parties have had it in mind that a ship should be ready to load before the end of August when the charter-party was entered into on August 30? It is only necessary to refer to the cancellation clause to answer that question. Here the parties must have had in mind the dates between August 30, and September 20 when they included that clause. Any other limit is purely arbitrary. I think one must read "ready to load any time before September 20."

It is further said that the plaintiff never declared a ship, and I think that that contention is right. On Sept. 12, the plaintiff declared "the 'Kotka' or substitute," which is not declaring any ship at all, because of the word "substitute." When the plaintiff declared the "Marta" she could not have been expected to load by Sept. 20, 1934, by reason of the position of the ship. Therefore I think that the obligation to declare a ship was broken, and the result was that there was a breach of a condition precedent and the charterers could decline a ship and the breach would give rise to an action for damages, and the damages would be the difference, if any, in the cost of the freight of the ship in the charter-party and the ship chartered.

Apart from a letter on Sept. 18, 1934, no objection was taken by defendants to the "Marta," and in fact the defendants informed the plaintiff that the latter date would suit them better. On Sept. 25 the "Marta" goes to her loading port and arrives on Sept. 27, and takes

the load on board. Damages can be claimed for delay in delivery, but before you can get them you must fix some contractual time, and how can it be said that in this case any such time was fixed? Again, there was no limit as to the size of the ship declared under the charter-party. The ship could have gone to other ports to collect cargoes after collecting the defendants' cargo. How can it be said that there has been a breach of contract because the goods did not arrive in London until Oct. 15, 1934? As I have said, the vessel might have gone to other ports after loading the defendants' goods. It seems to me that there is the end of the counterclaim. Damages can be recovered where there is delay in delivery of goods where there is a stipulated time. The ships of to-day, with all modern facilities, run with the regularity of railway trains, and if goods are delivered late and there is a loss of market, then the charterer can recover that loss (*Dunn* v. *Bucknall Bros.*, *Dunn* v. *Currie* (1)).

[His Lordship then considered the question of damages and gave judgment for the plaintiff on the claim with costs; judgment for the defendants on the counterclaim for a nominal sum and as 40*s*. had been paid into Court, that sum to be paid out to the defendants with costs up to the time of payment in, the plaintiff to have the costs of the counterclaim from that time.]

Solicitors: *Sinclair, Roche & Temperley* (for the plaintiff): *Pritchard Sons, Partington & Holland* (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

LONDON COUNTY COUNCIL *v.* BETTS.
LONDON COUNTY COUNCIL *v.* DOWNES.

[King's Bench Division (Talbot, Macnaghten and du Parcq, JJ.), **February 3, 10, 1936.**]

Poor Law—Order for maintenance—Enforcement.

In 1910 B. was ordered by a metropolitan magistrate under the Poor Law Amendment Act, 1868, s. 33, to pay to the then Poor Law Authority 2*s.* per week towards the maintenance of his wife. In 1935 B.'s payments had fallen in arrear. A complaint made by the Poor Law Authority was dismissed by the magistrate who held that he had no jurisdiction to enforce payment of the arrears by reason of the repeal of the Poor Law Amendment Act, 1868, s. 33, by the Poor Law Act, 1927, and the absence of any substituted mode of recovery either in that Act or in the Poor Law Act, 1930. The Poor Law Authority appealed:—

Held: the magistrate had jurisdiction to enforce payment of the arrears by virtue of the Summary Jurisdiction Act, 1879, ss. 6 and 35, notwithstanding the repeal of the Poor Law Amendment Act, 1868, s. 33.

[**EDITORIAL NOTE.** The draftsman of the Poor Law Act, 1927, considered that the Summary Jurisdiction Act, 1879, ss. 6 and 13, were sufficient and appropriate machinery for enforcing orders for maintenance made at the instance of Poor Law Authorities. This the Court, in this case, held to be the right view, and no special statutory enactment is required to secure the enforcement of such orders.

As to the Enforcement of such Orders for Maintenance, see HALSBURY. 1st Edn., Vol. 22, p. 571, para. 1210. For the Statutes referred to, see HALSBURY COMPLETE STATUTES OF ENGLAND, as follows:

Summary Jurisdiction Act, 1848 (*c.* 43), 11 Statutes 270.
Debtors Act, 1869, (*c.* 62), 1 Statutes 573.
Summary Jurisdiction Act, 1879 (*c.* 49), 11 Statutes 324.
Poor Law Act, 1927 (*c.* 14), 12 Statutes 956.
Local Government Act, 1929 (*c.* 17), 10 Statutes 883.
Poor Law Act, 1930 (*c.* 17), 12 Statutes 968.]

Case referred to:

(1) *Re Gamble* [1899] 1 Q.B. 305; 37 Digest 236, *289*.

Appeal by way of case stated from a judgment of a metropolitan magistrate, that he had no jurisdiction to make an order for the payment by the defendant of arrears of maintenance due by virtue of an order made against the defendant on Feb. 1, 1910, under the Poor Law Amendment Act, 1868, s. 33, because the previous mode of enforcement prescribed by the said Act was repealed by the Poor Law Act, 1927, and no new procedure had been substituted for it.

On Feb. 1, 1910, John Betts, the respondent, was ordered by a magistrate under sect. 33 of the Poor Law Amendment Act, 1868, to pay 2*s.* per week towards the relief and maintenance of his wife. On Oct. 4, 1935, the sum of £2 8*s.* 0*d.* was due from him as arrears. The appellant

Council, who by virtue of the Local Government Act, 1929, perform the duties of the former Guardians of the Poor of Southwark Union, complained on that day, by their authorised officer, to the stipendiary magistrate sitting at Tower Bridge Police Court that this sum was due from the respondent. On Nov. 4, 1935, the magistrate dismissed their complaint, and was requested to state a case for the opinion of the Divisional Court.

In this case stated the magistrate said that his attention had been directed to a doubt as to whether the court had any jurisdiction to enforce the payment of arrears by making an order for debt—the order for which the appellants applied—by reason of the repeal of sect. 33 of the Poor Law Amendment Act, 1868, by the Poor Law Act, 1927, and the absence of any substituted mode of recovery either in that Act or in the subsequent Poor Law Act, 1930. He came to the conclusion that he had no such jurisdiction.

Vernon Gattie for the appellants.

The respondents did not appear and were not represented.

TALBOT, J.: In this case the London County Council, as Poor Law Authority, complained to one of the metropolitan police magistrates that certain payments ordered by another magistrate at the same court in 1910 under the Poor Law Amendment Act, 1868 (the relevant part of which has since been repealed), to be made by the respondent for the maintenance of his wife by the Poor Law Authority then existing, were in arrear to the amount of £2 8*s.* 0*d.*, and applied for an order for payment of the said arrears. The learned magistrate held that he had no jurisdiction to hear the complaint or to make the order, and dismissed the complaint accordingly.

To found the magistrate's jurisdiction the money must be due under some Act (whether passed before or after 1879) which makes it recoverable on complaint. Then by the Summary Jurisdiction Act, 1879, s. 6, it is to be deemed to be a civil debt, and is to be recovered in the way in which a sum declared by the Act of 1879 to be a civil debt is recoverable under that Act, and not otherwise.

By sect. 35 of the Act of 1879:

> Any sum declared by this Act, or by any future Act, to be a civil debt, which is recoverable summarily, or in respect of the recovery of which jurisdiction is given by such Act to a court of summary jurisdiction, shall be deemed to be a sum for payment of which a court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts.

The power of a court of summary jurisdiction to make an order upon a husband for maintenance payments, and to determine how and to whom they shall be paid, is now conferred by the Poor Law Act, 1930, s. 19; the Act of 1868, under which the original order in the present case was made in 1910, having been repealed. By sect. 19 of the Act of 1930

the order is to be made on complaint ; and this of itself, apart from the Summary Jurisdiction Act, 1879, makes what is ordered to be paid become a civil debt (*Re Gamble* (1)).

The result, in my opinion, is that the learned magistrate had jurisdiction, by virtue of the Summary Jurisdiction Act, 1879, ss. 6 and 35, to make an order for the payment of arrears due under the order made upon the respondent under the Poor Law Amendment Act, 1868, notwithstanding the repeal of sect. 33 of that Act.

The draftsman of the Poor Law Acts, 1927 and 1930 (in both of which the special provisions of sect. 33 of the Act of 1868, applying the Summary Jurisdiction Act, 1848, as to the mode of recovering money ordered by courts of summary jurisdiction to be paid, are omitted) evidently though, and in my opinion rightly, that since the passing of the Summary Jurisdiction Act, 1879, they had become unnecessary.

The case of Downes, in which a special case was also stated by the same learned magistrate, raises the same point, though the order in Downes' case was made under the Poor Law Act, 1927, and not under the Act of 1868.

With great respect to the learned magistrate, I think that he was mistaken in thinking that he had no jurisidction to hear these complaints, and they must therefore be remitted to him so that he may hear and determine them.

Macnaghten, J.: I am of the same opinion. The order dated Feb. 1, 1910, made on the complaint of the Guardians of the Poor of the Southwark Union, whereby the respondent, John Henry Betts, was ordered to pay 2*s*. per week towards the cost of the relief of his wife, was made under the provisions of sect. 33 of the Poor Law Amendment Act, 1868, which provided that, where a married woman required relief without her husband, the justices in petty sessions might make an order upon the husband to pay such sum, weekly or otherwise, towards the cost of the relief of his wife as should appear to them, having regard to all the circumstances of the case, to be proper, and that, if the payments due thereunder were in arrear, the order should be enforced in the manner prescribed by the Summary Jurisdiction Act, 1848.

The Poor Law Act, 1927, consolidated into a single Act the various enactments which were then in force relating to the relief of the poor in England and Wales. By its sect. 245 it repealed the existing enactments, including sect. 33 of the Poor Law Amendment Act, 1868 ; but it provided by the same section that any order made under any enactment thereby repealed should have effect as if it had been made under the corresponding section of that Act, and might be enforced accordingly.

The Poor Law Act, 1927, s. 43 (1) corresponds with the Poor Law Amendment Act, 1868, s. 33 ; it re-enacts so much of the earlier section as empowered a court of summary jurisdiction, where a married woman

required relief without her husband, to make an order for maintenance upon the husband ; but it did not re-enact the latter part of the section, which provided for the enforcement of such an order in the manner prescribed by the Summary Jurisdiction Act, 1848, because—as it seems to me—that provision had been rendered inoperative for nearly fifty years by the Summary Jurisdiction Act, 1879, s. 6.

The functions of the Guardians of the Poor of the Southwark Union were transferred to the appellants, the London County Council, by the Local Government Act, 1929 ; and in the following year the law relating to the relief of the poor was again consolidated by the Poor Law Act, 1930. Sect. 19 (1) of that Act corresponds with sect. 43 (1) of the Poor Law Act, 1927.

The learned magistrate dismissed for want of jurisdiction the summons issued on the complaint of the London County Council that the payments due under the order of Feb. 1, 1910, were in arrear. In his opinion, if I rightly understand his judgment, the order of Feb. 1, 1910, was enforceable in the manner prescribed by the Summary Jurisdiction Act, 1848, until the Poor Law Act, 1927, came into force ; but, by reason of the omission in sect. 19 of that Act of any express provision for the enforcement of orders of maintenance made thereunder, such orders could not be enforced by a court of summary jurisdiction, and he therefore had no jurisdiction to enforce the order of Feb. 1, 1910.

In my opinion this view is erroneous : it is based, I think, upon a misapprehension of the meaning and effect of the Summary Jurisdiction Act, 1879, s. 6. Under the provisions of the Summary Jurisdiction Act, 1848, an order for the payment of money could be enforced by imprisonment. The Debtors Act, 1869, which provided that, subject to certain exceptions, no person should be imprisoned for making default in the payment of a sum of money, did not affect the power of imprisonment conferred upon courts of summary jurisdiction by the Summary Jurisdiction Act, 1848, because one of the exceptions mentioned in the Debtors Act was " default in payment of any sum recoverable summarily before a justice or justices of the peace." Ten years later, however, Parliament was minded to restrict the power of imprisonment in the case of money recoverable on complaint to a court of summary jurisdiction ; and accordingly it was provided by the Summary Jurisdiction Act, 1879, s. 6, that :

> Where under any Act, whether past or future, a sum of money . . . is recoverable on complaint to a court of summary jurisdiction, and not on information, such sum shall be deemed to be a civil debt, and if recovered before a court of summary jurisdiction shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily is recoverable under this Act, and not otherwise

The language of this section is certainly involved, but the meaning is

plain enough. A sum of money which is by statute recoverable on complaint to a court of summary jurisdiction is to be deemed "a civil debt," and an order for the payment of such a sum may be enforced by the Court in the manner prescribed by the Summary Jurisdiction Act, 1879, in the case of civil debts, and not otherwise.

The Summary Jurisdiction Act, 1879, s. 35, deals with the enforcement of orders for the payment of civil debts. It provides that such orders can no longer be enforced by imprisonment except (to put it shortly) on proof of means, and that then a court of summary jurisdiction is to have no greater power of imprisonment than that given to a county court under the Debtors Act, 1869.

In my opinion, therefore, an order for maintenance made under the Poor Law Amendment Act, 1868, s. 33, or under the Poor Law Act, 1927, s. 43 (1), or under the Poor Law Act, 1930, s. 19 (1), can be enforced by a court of summary jurisdiction as a civil debt under the Summary Jurisdiction Act, 1879, s. 6.

In the case of Downes, the order dated March 21, 1929, was duly made under the Poor Law Act, 1927, s. 43 (1).

I think, therefore, that both the appeals should be allowed.

Du Parcq, J.: I agree that the learned magistrate was wrong in holding that he had no jurisdiction to make the orders for which application was made in these two cases. The difficulty which the learned magistrate felt was occasioned by the repeal of sect. 33 of the Poor Law Amendment Act, 1868, by the Poor Law Act, 1927, and, to use his own words, "the absence of any substituted mode of recovery either in that Act or the subsequent Poor Law Act 1930."

The repealing section of the Poor Law Act, 1927 (sect. 245), contained a proviso which, if words immaterial for the present purpose are omitted, is as follows:

> Nothing in this repeal shall affect any order made or proceedings taken under any enactment hereby repealed, but any such order or proceedings shall have effect as if made or taken under the corresponding provision of this Act and may be enforced accordingly.

The Poor Law Act, 1930, s. 164, by which the greater part of the Poor Law Act, 1927, was repealed, contained a proviso in the same terms.

The order made against John Betts on Feb. 1, 1910, whereby he was ordered to pay 2*s.* 0*d.* per week to the Guardian of the Poor towards the relief of his wife, was made under the Poor Law Amendment Act, 1868, s. 33. That section contained a provision for the enforcement of orders made under it which is not reproduced in the Poor Law Acts of 1927 and 1930. This omission is easy to understand. What sect. 33 of the 1868 Act provided was that orders made under it should be enforced in the manner prescribed by the Summary Jurisdiction Act, 1848. The manner prescribed by the 1848 Act in cases where an order

required the payment of a sum of money was the issue of a distress warrant by the justices. The Summary Jurisdiction Act, 1879, s. 6, provided, however, that where under any Act, past or future, a sum of money claimed to be due was recoverable on complaint to a court of summary jurisdiction and not on information, such sum was to be deemed to be a civil debt and was to be recovered in the manner in which a sum declared by the same Act to be a civil debt recoverable summarily was recoverable thereunder, and not otherwise. Since 1879, therefore, the procedure prescribed by the Act of 1848 has been abolished for this purpose, and it would have been surprising if the reference to the 1848 Act in sect. 33 of the Act of 1868 had been reproduced in the Poor Law Acts of 1927 and 1930.

The learned magistrate is, however, right, in my opinion, when he says that the Poor Law Acts of 1927 and 1930 prescribe no means of recovery of sums due under orders made in pursuance of the sections of those Acts—viz., sects. 43 and 19 respectively—which give power to obtain maintenance orders. The answer suggested to the argument of the learned magistrate is that it was unnecessary to prescribe a mode of recovery in these Acts because the mode of recovery was already prescribed by the Summary Jurisdiction Act, 1879. Speaking for myself alone, I am doubtful whether the difficulty felt by the learned magistrate can be disposed of so readily. In my view the application made by the Southwark Guardians on Feb. 1, 1910, was not an application whereby any sum was claimed to be due, nor was any sum recovered or recoverable upon that application. No sum was claimed to be due until Betts made default, and there is nothing to show that the sum of £2 8*s.* 0*d.* now said to be due from him was claimed to be due at any date prior to Feb. 1, 1910. Further, it is, in my opinion, at least doubtful whether it can be said that by sect. 19 of the Poor Law Act, 1930, jurisdiction is given to a court of summary jurisdiction in respect of the recovery of the sums which under that section the court may order to be paid, so as to bring the sums now claimed within the Summary Jurisdiction Act, 1879, s. 35.

I incline to the view, therefore, that if, when the learned magistrate was asked to make the order in this case, he had been referred only to the Summary Jurisdiction Act, 1879, as the source of his jurisdiction, he would have been right in thinking that that Act by itself did not confer jurisdiction upon him. I agree with him also that the repealed Act of 1868 could not be relied upon for this purpose.

Though I share the difficulty of the learned magistrate to this extent, I arrive at the same goal as my brethren, by, I fear, a more circuitous road. I need not say that I am willing to believe that the shorter way may be the better. I will, however, set out the steps in my journey as briefly as possible :

1. The order of Feb. 1, 1910, must have effect as if made under the Poor Law Act, 1930, s. 19.

2. The Poor Law Act, 1930, does not state or provide any mode of enforcing payment of the sums of money payable under maintenance orders such as the order of Feb. 1, 1910.

3. The Summary Jurisdiction Act, 1848, s. 19, provided that, where an order required the payment of a sum of money and by the statute in that behalf no mode of enforcing the payment of the same was stated or provided, justices might issue distress warrants.

4. An application to the justices for a distress warrant under the Summary Jurisdiction Act, 1848 (Jervis' Act) was properly made by complaint and not on information. This proposition is established by the judgment in *Re Gamble* (1) (see especially the judgment of Willes, J., at p. 307).

It follows, in my judgment, that this application came exactly within the words of sect. 6 of the Summary Jurisdiction Act, 1879. The sum due was recoverable under a past Act—viz., the Act of 1848—on complaint to a court of summary jurisdiction, and in these circumstances the Act of 1879 comes into operation to say that the procedure prescribed by the Act of 1848 is not to be followed but the sum is to be recovered as a civil debt.

The order in the case of Downes was made under the Poor Law Act, 1927, and the reasoning which leads me to differ from the learned magistrate in the case of Betts obviously applies to Downes' case also.

Appeals allowed.

Solicitors: *J. R. Howard Roberts* (for the appellant Council).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

CROXFORD *v.* UNIVERSAL INSURANCE CO., LTD. NORMAN *v.* GRESHAM FIRE & ACCIDENT INSURANCE SOCIETY, LTD.

[COURT OF APPEAL (Slesser and Scott, L.JJ., and Eve, J.), **February 14, 17, 18, 1936.**]

Insurance—Accident—Motor car—Third party risks—Retrospective operation of Statute—Road Traffic Act, 1934 (*c.* 50), *s.* 10.

(i) An accident occurred on June 13, 1934. On June 29 the insurance company repudiated the policy and demanded the return of the certificate of insurance. On July 12 this was returned and cancelled. On July 31 the Road Traffic Act, 1934, received the Royal Assent. On Aug. 3 an action was commenced against the assured, and damages were awarded against him on Feb. 6, 1935. On Jan. 1, 1935, the Road Traffic Act, 1934, s. 10 came into operation. The plaintiffs in the action then sought in a further action to render the insurance company liable to pay the damages awarded them :—

HELD : there was no policy in existence after July 12, 1934, on which the Road Traffic Act, 1934, could operate, and the Act could have no possible effect in such a case.

(ii) An accident, due to the negligence of T. T., Ltd., occurred on Sept. 13, 1934. On Oct. 26, 1934, an action for damages for personal injuries was commenced against T. T., Ltd. On Feb. 12, 1935, the injured party recovered damages against T. T., Ltd. It was alleged that on Jan. 17, 1934, an insurance company insured T. T., Ltd., for one year against third-party claims, but LEWIS, J., found as a fact that either there was no contract of insurance, or, if there was, it could have been avoided on the ground of material misrepresentation.

HELD : the insurance company as a result of the whole of the provisions in Road Traffic Act, 1934, s. 10, had a right to a period of three months after Jan. 1, 1935, in which to commence an action for a declaration that they were entitled to avoid or had avoided the policy on the ground of non-disclosure or material misrepresentation, apart from any provision in the policy. As this action for a declaration had to be commenced within three months of the commencement of the action against the assured, the insurance company had only until three months after Oct. 26, 1934, i.e., until Jan. 26, 1935, to bring this action for a declaration. As that did not give them a three-months' period after Jan. 1, 1935 (when the Act was brought into operation), the Road Traffic Act, 1934, had no application.

[**EDITORIAL NOTE.** The Road Traffic Act, 1934, s. 10, is designed to secure that judgments obtained in "running-down" actions shall be met by the insurers of the defendants. The present cases only relate to the position when the section was brought into operation on Jan. 1, 1935. There are two conditions in the section which have to be noted to understand the decisions herein. First, there must be notice to the insurer within seven days of the commencement of the running-down action. Secondly, the insurer may, within three months of the commencement of the running-down action, sue for a declaration that he is entitled, apart from any provision in the policy to avoid it on account of non-disclosure or material representation, or if he has so avoided it, then a declaration that he was entitled to do so. The decisions here are simply that this three months' period in which the insurer may bring his action for a declaration must have been available to the insurer after that Act came into operation, i.e., after Jan. 1, 1935. In other words, the running-down action must have been commenced on or after Jan. 1, 1935. The first case

appears also to support the contention that where a certificate of insurance is returned and cancelled the insurers need bring no action for a declaration: but apparently where the policy has been quite properly avoided or cancelled, but there is still a certificate current, the insurer must within the time limited bring his action for a declaration. Scott, L.J., makes such observations on this aspect of the cases towards the end of his judgment.

For the Road Traffic Act, 1934, s. 10, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 27, pp. 544, 545, and for a Statement of the Effect of Act, see HALSBURY, Hailsham Edition, Vol. 17, pp. 563-565, paras. 913, 914.]

Cases referred to:

(1) *Ward* v. *British Oak Insurance Co., Ltd.* [1932] 1 K.B. 392; Digest Supp.
(2) *Moon* v. *Durden* [1848] 2 Exch. 22; 42 Digest 695, *1102.*
(3) *Re Nautilus Steam Shipping Co., Ltd., Ex p. Gibbs & Co.* [1936] 1 Ch. 17.
(4) *Re Tottenham's Estate, Ingram & Harrison Petitioners* [1886] 17 L.R. Ir. 174; 28 Digest 209, *690* (*i*).
(5) *Re Athlumney, Ex p. Wilson* [1898] 2 Q.B. 547; 42 Digest 703, *1191.*
(6) *Rorke* v. *Errington* [1859] 7 H.L. Cas. 617; 42 Digest 628, *304.*

Croxford *v.* Universal Insurance Co. Ltd.

Appeal from a judgment of Horridge, J.

The defendant company insured one Herbert Davison on Dec. 20, 1933, against liabilities to third parties in respect of a motor lorry, and delivered to him a certificate of insurance. On June 13, 1934, Mr. J. W. Croxford, on whom the plaintiffs were dependent, was killed by reason of the negligence of the insured. By a letter dated June 29, 1934, the defendant company repudiated the policy on the ground of mis-statement or concealment of material facts by Davison, and demanded the return of the certificate of insurance. This was returned, and cancelled by the company on July 12. On July 31 the Road Traffic Act, 1934, received the Royal Assent, but by sect. 42 (3) the Minister of Transport was given power to appoint the day on which each provision should come into force. The operation of sect. 10 was postponed under this section. On Aug. 3 the widow, mother and children of the deceased J. W. Croxford (the respondents in this appeal) issued a writ against Davison under the Fatal Accidents Act, 1846. On Jan. 1, 1935, the Minister of Transport brought the Road Traffic Act, 1934, s. 10, into operation by order. On Feb. 6, Horridge, J., heard the action under the Fatal Accidents Act and awarded the plaintiffs £3,000 damages and costs.

The dependants then brought against the insurers of Davison (the appellants) an action under sect. 10 (1) of the Act of 1934, claiming a declaration that the defendant company were liable to pay the plaintiffs the amount of the judgment against Davison, with interest and costs. The learned Judge gave judgment for the plaintiffs for the amount claimed, on the ground that the 1934 Act was known, as it had received the Royal Assent on July 31, 1934, and the defendants could have

taken proceedings under sect. 10 (3) to obtain protection. Even if such proceedings could not have been taken, the plaintiffs could have recovered, because the judgment was obtained since the coming into operation of sect. 10.

The defendants appealed.

Tristram Beresford, for the appellant company: It was not possible for the appellants to avail themselves of the protection of sect. 10 (3), for the provision was not in force until Jan. 1, 1935. The plaintiffs could not have been brought before the court by any known process. Even if the appellants could have obtained a declaration, they would not have satisfied the proviso which required them to give notice to the plaintiffs seven days after they commenced their action. If the appellants had delayed their proceedings so long that judgment had been given in 1935, then, according to the judgment of HORRIDGE, J., they could have prayed in aid sect. 10. As it was, their time expired in November, even if they had known of the provisions of subsect. (3), which was not in force at that time. Appellants were not required to know sect. 10 before 1935, for it was not in force. *Ward* v. *British Oak* (1) is an authority for the proposition that a statute framed in the terms of the Road Traffic Acts cannot interfere with vested interests which may have arisen before their passing. *Moon* v. *Durden* (2) is distinguishable.

Robert Fortune, for the respondents: It is necessary to look at all the circumstances surrounding each Act of Parliament. The 1934 Act should be construed as amending the third-party provisions of the principal Act, and is entitled to a liberal construction, like other Acts which have been passed to remedy a particular evil. It would have been open to Parliament to give relief only to third parties who had sustained injury after Jan. 1, 1935, and not to those who obtained judgments after that date. The Act having been passed in the respondents' interest, the court should give it a favourable construction on their behalf. The insurers could have brought their action for a declaration at any time after they had notice of the action of *Croxford* v. *Davison*. R.S.C.Ord. XXV, r. 5, is amply wide enough for the appellants to obtain a declaration on the footing that sect. 10 was to come into force when the Minister so ordered.

NORMAN *v.* GRESHAM FIRE & ACCIDENT INSURANCE SOCIETY, LTD.

APPEAL from a judgment of LEWIS, J.

On Sept. 13, 1934, after the passing of the Road Traffic Act, 1934, s. 10, a lorry driven by a servant of Tanners Transport Ltd. collided with a motor coach in which Mr. J. T. Norman, the appellant (the plaintiff in the action), was travelling, so that he suffered severe injury. On Jan. 1, 1935, the Minister of Transport brought sect. 10 into operation.

On Feb. 12th, 1935, Mr. Norman recovered damages before DU PARCQ, J., in the King's Bench Division against Tanners Transport Ltd. for £2123 and costs. On Apr. 1 1935, BENNETT, J., in the Chancery Division ordered that Tanners Transport Ltd. be wound up, whereupon the rights of Tanners Transport Ltd. against the defendant company (the respondents) in respect of a contract of insurance alleged to have been made by the defendant company with Tanners Transport Ltd. were vested in Mr. Norman.

The plaintiff alleged that the defendant company had on Jan. 17, 1934, by a contract of insurance, partly verbal and partly in writing, agreed to indemnify Tanners Transport Ltd. for one year against (*inter alia*) claims by third parties. No policy was issued. The learned judge found as a fact that no contract of insurance had ever been made; or, alternatively, that the contract could have been avoided for misrepresentation and suppression of material facts. Dealing with the argument of counsel for the plaintiff that the Road Traffic Act, 1934, s. 10 was retrospective, the learned Judge referred to the judgment of HORRIDGE, J., in *Croxford* v. *Universal Insurance Co., Ltd.* This, he said, had been a considered judgment, and if it had been necessary for him to decide whether the Act had been retrospective he would have loyally adhered to what HORRIDGE, J., had said. He did not think the point an easy one and, but for that decision, might have had some difficulty in coming to the conclusion to which he came; but, having considered the matter and looked again at the judgment, he in no sense differed from it.

The plaintiff appealed.

Serjeant A. M. Sullivan, *K.C.*, and *W. B. Franklin* (for the appellant): There was a contract of insurance, and everything material took place after the passing of the 1934 Act. In the *Croxford* case at the passing of the Act there was no contract of insurance subsisting. Sect. 10 of the 1934 Act is an enlargement of legislation which began with the Third Parties (Rights Against Insurers) Act, 1930.

The real question is, at what moment the statutes become effective to change the rights of the parties to the contract. In *Re Nautilus S.S. Co. Ltd., Ex p. Gibbs & Co.* (3), it was held that, the winding-up of the company having supervened after the Act of 1930 came into operation, sect. 1 of that Act became operative and enured to transfer the benefit of the policy of insurance from the company to the third party. The wording of sect. 10 of the 1930 Act leads to exactly the same results as the decision in the *Nautilus* case (3), Parliament having determined that the insurance company should pay third parties even if the contract of insurance was voidable. Sect. 10 (3) deals only with defences and has nothing to do with the question of whether the provisions of subsect. (1) are retrospective. It was always open to the insurers under R.S.C.

Ord. XXV, r. 5, to bring an action for a declaration that they were free from obligation, for it is open to anyone to have it established that he is not bound by the terms of apparent contract. They had the ordinary action of an insurance company for recission on the ground of suppression of material facts.

Hardship may be caused by plain words in a statute: *Rorke* v. *Errington* (6); *Re Tottenham's Estate* (4).

W. B. Franklin (following): There was no hardship on the insurance company because, although the order made by the Minister did not bring the Act into operation until Jan. 1, 1935, it was promulgated on Nov. 13, 1934. They would therefore have time to bring their action for a declaration.

Croom-Johnson, K.C., and *Montague Berryman* (for the respondent company): Appellants are claiming that the effect of the 1934 Act is to take away *ex post facto* a common-law right which vested the moment the policy was executed, and to deal with it as though it did not exist. The law regards strictly any suggestion to take away a common-law right.

SLESSER, L.J.: The Landlord and Tenant Acts and the Workmen's Compensation Acts must be construed in favour of the classes of persons for whose benefit they were passed.

Croom-Johnson, K.C.: MAXWELL ON THE INTERPRETATION OF STATUTES, 7th Edn., page 186 is in point.

Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes retrospective operation. *Nova constitutio futuris formam imponere debet, non praeteritis.* They are construed as operating only in a case or on facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.

Re Athlumney (5), at page 551 is to the same effect.

He was stopped by the Court.

The Court having heard argument in both cases delivered the following judgments dealing with both cases.

SLESSER, L.J.: These two cases, *Croxford* v. *The Universal Insurance Co., Ltd.*, and *Norman* v. *The Gresham Fire & Accident Insurance Society, Ltd.*, have one feature in common: they both depend to a considerable extent on the interpretation of a section of the Road Traffic Act, 1934, and, although some of the facts in the two cases are different, yet, having regard to matters which I will later mention, the court has thought it convenient to hear one case immediately after the other. I propose, therefore, at the outset to state so much of the facts of the two cases as I think are material to this matter which applies to both of them in

common, and then to distinguish, in so far as it is necessary to distinguish, the facts of one case from those of the other.

Both of these actions are brought against insurance companies; in the one case by the widow and dependants of a person who had been killed in a motor accident, the widow Lilian Croxford and a number of dependants, whose christian names I need not mention, suing under Lord Campbell's Act; in the other case by a Mr. Norman, who was also injured in a motor accident. The liabilities of the respective insurance companies, the Universal Insurance Co., Ltd., in the *Croxford* case, and the Gresham Fire & Accident Insurance Society, Ltd., in the other case, both arise by the operation of certain statutes, which I shall have to consider, and arise—if I may use the phrase—at second hand: that is to say, the original rights of action of the plaintiffs in both cases were against persons who had done them injury, but by the operation of law, beginning with the two Acts of 1930 and the Road Traffic Act, 1934, those liabilities are in certain circumstances transferred to the insurance companies, who thereby become defendants in the present actions.

It may be convenient at this point to mention the material dates which give rise to the present causes of action. In the *Croxford* case the accident occured on June 7, 1934. The action was brought by the dependants against the persons responsible for the accident, the defendants, who were insured, on Aug. 3, 1934, and judgment in that action, which we may conveniently call the running-down action, was given on Feb. 6, 1935, for a considerable sum of money, some £3,000. The present action, that is to say, the action of these plaintiffs, Lilian Croxford and the rest, against the Universal Insurance Company was brought on Apr. 2, 1935. Those are the material dates so far as regards the *Croxford* case. With regard to the *Norman* case, the accident occurred on Sept. 13, 1934. The running-down action against the assured was brought on Oct. 26, 1934, and on Feb. 12, 1935, judgment was given in that action. Subsequently there was a winding-up on Apr. 1, 1935, of the firm called Tanners Transport Company, Limited, who were the defendants in that running-down action, and the present action against the insurance company was instituted on May 1, 1935. Those seem to me all the material dates which I have to consider so far as the acts done by the parties in litigation are concerned.

So far as the law is concerned, the matter stands thus. Before 1930 there was no *nexus* in law between the insurance company and a plaintiff who was suing the assured of that insurance company for damages, when that assured had been insured against the events which caused the action to be brought. The sole remedy at common law of the plaintiff was against the person who had injured him, and whatever relations there might have been between that person and the insurance company did not affect the plaintiff except to this extent: that, of

course, normally one would find provisions for subrogation in the conditions of the insurance company, and the insurance company, no doubt under their contract of insurance with the assured had, in certain circumstances, the right to conduct the proceedings in the place of the assured.

By the Third Parties (Rights Against Insurers) Act, 1930, third parties injured, that is, the plaintiffs in running-down actions, were given certain rights in the event of the insured becoming insolvent and in certain other events, and by sect. 1 (1) of that Act it was for the first time provided, producing a novel situation in the law, that

> Where under any contract of insurance a person is insured against liabilities to third parties which he may incur, then in the event of the insured becoming bankrupt [and in certain other cases, in the case of companies being wound up and the like] if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act . . . be transferred to and vest in the third party to whom the liability was so incurred.

Now at that time there was no obligation upon persons driving motor cars to insure themselves. This short Act which I have mentioned is general in its terms and is not limited as such to any particular class of insured person. It applies to any contract of insurance where a person is insured against liability to third parties. But by the Road Traffic Act, 1930, Part II, a special provision was made, over and beyond what had been dealt with in the Act to which I have already referred, in the case of persons using motor vehicles. Sect. 35, generally speaking, provides that it shall not be lawful for any person to use, or permit any other person to use, a motor vehicle on a road, unless there is in force in relation to the user of that vehicle such a policy of insurance in respect of third-party risks as complies with the requirements of the Act. Then in sect. 36 such a policy is prescribed. It is not necessary to deal with the particular machinery with regard to deposits and the like required; but sect. 38 is very important, in my opinion, for the present case. Sect. 38 provides this:

> Any condition in a policy or security issued or given for the purposes of this Part of this Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in sect. 36 (1) (*b*).

Now sect. 36 (1) (*b*) is dealing with the policy of insurance which "insures such person as may be specified in the policy in respect of any liability which may be incurred by him in respect of the death of or bodily injury to any person caused by or arising out of the use of a vehicle on a road."

It will be noticed that the conditions which are not to exempt the insurance company from liability to a third party, even if they be broken

by the assured, in sect. 38 are limited to cases of some specified thing being done or omitted to be done after the happening of any event giving rise to a claim under the policy. In other words, the fact that an assured fails, for example, under the conditions of a policy to give notice of the accident which might otherwise, as between the assured and the insurance company, be a sufficient answer for the insurance company not to pay, shall not avail as against the third party. But it will be noticed that the protection of the third party, notwithstanding the fact that the assured has not complied with all the conditions, which is given by sect. 38 is limited to cases of things done or omitted to be done after the happening of an event giving rise to a claim. In other words, if the contract were, to take the case which it is said has arisen here, to have been voidable by the insurance company *ab initio* for non-disclosure of a material fact, that circumstance would not in itself bring the case within sect. 38 of the Act of 1930, and the insurance company could still be heard to say, as against the third party : " This policy of the assured on which it is sought now to make me liable does not apply because there has been a non-disclosure of a material fact."

Now the two learned Judges who tried the two cases have found that in both the insurances, in the *Croxford* case and in the *Norman* case, there was non-disclosure of material facts. In the case of *Croxford*, where this point had been raised by the insurance company, Horridge, J., finds that as a fact. I shall have to refer further to the judgment of Horridge, J., but in reality in that case there was no question, because not only was it said by the insurance company that there had been such a material non-disclosure, but the certificate of insurance which, as I say, had been granted in that case was cancelled on July 12, 1934, for that reason. In the *Norman* case, the circumstances of which I shall have to examine in some further detail later, Lewis, J., in 52 Ll. L. Rep. at page 301, says this :

> I hold that the fact that the policies had been cancelled is a material fact which was concealed

—that is, that previous policies have been cancelled—

> and wilfully concealed from the defendants, if it is ever necessary to decide that point for the purposes of this case.

So here we have two cases which, in my opinion, before the Act of 1934 would in their circumstances have justified the insurance company, notwithstanding sect. 38 or any other provision of the Act of 1930, in saying that they were immune from any liability to the third party. In those circumstances it is sought to make the insurance companies liable by reason of new legislation in the Road Traffic Act, 1934, to which I must now refer.

This Act, although it received the Roval Assent on July 31, 1934,

contained, as many modern Acts do contain, a provision in sect. 42 (3) that :

> This Act shall come into operation on such day or days as the Minister may appoint, and the Minister may fix different days for different purposes and different provisions of this Act.

Acting under that sect. 42 (3), the Minister on Nov. 14, 1934, ordered that sect. 10—the only section material to this case, as altering the law governing third-party risks—should come into operation on Jan. 1, 1935.

I must now refer to an observation made by HORRIDGE, J., in the *Croxford* case on this point. The proceedings before HORRIDGE, J., are reported in [1935] 2 K. B. 409 and at page 417 HORRIDGE, J., says :

> In this case, however, the Act of Parliament was known, as it received the Royal Assent on July 31, 1934, and I cannot see why the defendants could not have taken proceedings under subsect. (3) to obtain protection under that section.

With every respect to the learned Judge, I cannot understand quite what he means by that sentence or what conclusion he intends to draw from it ; but in my opinion it is impossible to say that, for any purpose at all affecting the legal position between the parties, sect. 10 can be regarded as having any legal existence before the time that it was put into operation by the Minister under sect. 42 (3) of the Act. Either sect. 10 of this Act is part of the law or it is not, and it is clear to my mind that before Jan. 1, 1935, this Road Traffic Act, 1934, or at any rate such parts of it as the Minister had already brought into force by earlier orders under sect. 42, must be read as if sect. 10 did not exist. Reading sect. 10 as having no existence before Jan. 1, 1935, important consequences arise in the present case. The Road Traffic Act, 1934, s. 10, deals with that very matter which was left out of sect. 38 of the Act of 1930, namely, the case where the insurance company were entitled to avoid or cancel the policy. The language of sect. 10 (1) is as follows :

> If, after a certificate of insurance has been delivered under sect. 36 (5) of the principal Act to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under sect. 36 (1) (*b*) of the principal Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Now the effect of the subsection standing alone is this : that after the passing of sect. 10 a further possible immunity of the insurance company is taken away. They are no longer, if the policy be one covering the liability to the third party, able to take the point as against that third party that the insurer may be entitled to avoid or cancel the policy.

They had already, as I have said, been prevented from taking that position in regard to matters which had been done or omitted to be done after the happening of the event giving rise to a claim by the Road Traffic Act, 1930, s. 38, but now they are prevented from taking the point that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy.

It is said on behalf of the two respective claimants that, in both these cases, judgment was given after the coming into force of sect. 10, being judgment for £3,000 odd in the *Croxford* case on Feb. 6, 1935, and judgment in the *Norman* case for £2,000 odd on Feb. 12, 1935; and it is said that, although there is a finding in both cases of non-disclosure of a material fact such as might justify the insurance company in avoiding or cancelling the policy—and such as did, in fact, enable the insurance company, in the *Croxford* case, to cancel the policy—nevertheless sect. 10 (1) operates now that a judgment has been obtained after sect. 10 is in operation; to use the language there, "a judgment in respect of a liability has been obtained." Therefore, notwithstanding that, the insurance company cannot be heard to say: "We had a right to avoid or cancel, or did avoid or cancel, these policies, and are under no liability." Such a view is only possible if subsect. (1) is to be read by itself, without any regard to the remainder of the subsection.

We have been favoured by Serjeant Sullivan with an interesting analysis of the law as to how far you are permitted, as a matter of general principle, to read one section or subsection of an Act in the interpretation of another section or subsection. For that purpose we have been referred to certain cases of weight in Ireland, and Mr. Croom-Johnson has also favoured us with extracts from the well-known work, Maxwell on The Interpretation of Statutes. But in my view it is not necessary in the present case to consider questions of general interpretation. When the present section is considered, its own terms and its own conditions make it quite clear that sect. 10 makes the insurance company liable in conditions and in circumstances which are clearly specified in the whole of that section, and not only in subsect. (1). That is to say, for the purposes of estimating the liability of the insurance company the section must be read as a whole.

Now, there is this great distinction to be drawn between sect. 38 of the Act of 1930 and sect. 10 of the Act of 1934, that sect. 38 of the Act of 1930, apart from one special proviso, does not qualify the liability of the insurance company. The language is express with regard to the liabilities ceasing in the event of some specified thing being done, or omitted to be done, after the happening of an event. But in the case of sect. 10, which is a very serious extension of the liability of the insurance company—indeed, one might almost say, a remarkable extension—making them liable to a third party on a policy which *ex hypothesi* either

does not exist or which they have a right to avoid, it is carefully qualified to give them protection. It is not every judgment which comes under sect. 10 (1) which makes the insurance company liable to a third party. To begin with, when we read sect. 10 (1), we find this language : "The insurer shall, subject to the provisions of this section, pay," and that in itself, apart from any question of general principle, is a direct limitation of a liability to pay, a liability which, as Mr. Croom-Johnson quite rightly observed, would be an invasion of their common law rights, putting upon them an obligation which did not exist under the contract between them and the assured. In terms, this section says : "The insurer shall, subject to the provisions of this section." Now, what are the provisions of this section ? Serjeant Sullivan has said that, at the highest, they only apply to the provisions of subsect. (2), which says that no sum shall be payable by an insurer in respect of any judgment unless before or within seven days after the commencement of the proceedings in which the judgment was given the insurer had notice of the bringing of the proceedings. That is referring, of course, to the judgment in the running-down action. That case, we are told, does not apply here, that both in the *Norman* case and in the *Croxford* case notice was given or, at any rate, if notice was not given, no point was made about the absence of notice in the court below. I express no opinion about it, because I have arrived at a conclusion favourable to the insurance company for other reasons. But it is useful for the purpose of construction to look at this. This section does indicate at once that the obligation to pay is not absolute ; it only arises where the subject matter of subsect. (1) might otherwise make the insurance company liable, where before or within seven days the insurer had notice of the bringing of proceedings. Then there follow a number of other provisions to the like effect. But the subsection here with which we are primarily concerned is subsect. (3), and for myself I can see no reason why subsect. (3) is not as much to be read into subsect. (1) as subsect. (2). I will again repeat that subsect. (1) says : "The insurer shall, subject to the provisions of this section, pay," and the opening words of subsect. (3) are : "No sum shall be payable by the insurer under the foregoing provisions of this section." Those conditions are the conditions under which the insurance companies respectively argue here that they are not liable in the present case. It is therefore necessary to look at them very critically.

> No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given

—that is the judgment in the running-down case—

> he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some

material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it: Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within seven days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled, if he thinks fit, to be made a party thereto.

In other words, notwithstanding the wide language of subsect. (1), making the insurance company liable even where he might have avoided or cancelled the policy, the insurance company may protect themselves and, if one may use the words, "contract themselves out of the sect. 10," though, perhaps, "contract" is not quite an appropriate word, but, at any rate, can take steps that sect. 10 shall not apply to them if they comply with the conditions set out in subsect. (3) and achieve, as the result of taking proceedings under subsect. (3), the result that they obtain the necessary declaration that the judgment was obtained by non-disclosure of a material fact, or representation of fact false in some material particular; that is to say, they themselves bring an action for a declaration for that purpose, and they are given under subsect. (3) three months after the commencement of the proceedings in which the judgment was given to obtain that declaration. They may do it before or within three months.

Now applying that protection to the present case, you arrive at this result. The action which we have to consider, from which the three months shall be dated, is, of course, the action in the running-down case. In the *Croxford* case, the action was brought on Aug. 3, and therefore, on or before Nov. 3, 1934, the insurance company would have had their right to start their action for a declaration exempting them from the provisions of sect. 10. It appears immediately obvious that, in this present case, no such right could possibly inure to their benefit, because in so far as sect. 10 did not come into operation until Jan. 1, 1935, there was, in my opinion, on Nov. 3, the last day of their election to get a declaration, no statutory means for them to obtain such a declaration as is provided in subsect. (3). Now, Serjeant Sullivan being faced with this fact, although the point did not so much arise in his case as in the earlier case, but speaking generally of these cases, says: "A declaration might be obtained in some proceedings for the rescission of the contract of insurance in the ordinary provisions such as are familiar in the Chancery Division for the rescission of a contract and consequent declaration." In my opinion, that is entirely wrong. If there were any doubt at all that the declaration here contemplated was to be done by statutory machinery provided by subsect. (3) and in no other way,

it is made quite clear by the proviso which I have already read, and which says the insurer who has obtained such a declaration shall not be entitled to the benefit of the subsect. unless within seven days after the commencement of that action—that is his action for a declaration —he has given notice thereof to the person who is the plaintiff, specifying the non-disclosure or false representation. It is clear to my mind, therefore, that given three months for his action and seven days more for his particularisation, that those particulars have to be given in accordance with the provisions of subsect. (3), Particulars given in an ordinary action for rescission of the contract and declaration would not specify the specific matters required in the proviso. It might well be, for example, that if the other side did not apply for particulars, in an ordinary action for rescission there would be no need for the plaintiff to specify the non-disclosure or false representation. It might well go to trial without such particularisation as is here mentioned. Here the statute in terms says that he must specify the non-disclosure or false representation on which he proposes to rely, "and any person to whom notice of such an action is so given shall be entitled, if he thinks fit, to be made a party thereto." It is clear that on Nov. 3, which would have been the last day on which the declaration could have been made, and for seven days thereafter in which the particularisation could be made, it would have been of no avail for this insurance company to say: "It is true that subsect. (3) is not in force, but I know this Act is passed; I anticipate that some day a Minister may appoint a day, and therefore in order to be quite safe *quia timet* I will get rescission of this contract in a court of law." Such a proposition, with every respect to the learned Serjeant, seems to me only to have to be stated to bear its own refutation. It is perfectly obvious that such a hypothetical case dealing with an imaginary danger, even if such an action could be entertained at all, would certainly not avail the insurance company here, that if they wished to be exempted from sect. 10, they must comply with the specific provisions of that section. It therefore follows that in the *Croxford* case it was impossible at any time for this insurance company to avail themselves of the machinery for exempting themselves from sect. 10, and if the plaintiffs here are right, it follows that the effect of this Act, in these cases of judgments obtained after sect. 10 came into operation, but of actions brought before, is that insurance companies are in this invidious position, that they are liable for all the burdens of sect. 10 and have no right to take advantage of any of the exceptions or protections; in other words, that the position of an insurance company is worse before Jan. 1, 1935, than it would have been afterwards, a most ridiculous situation, which really, as I say, with every respect to those who have argued it, merely has to be stated to be shown not only wrong, but lucidly wrong.

Now, the only difference in the *Norman* case is this : in the *Norman* case, the running-down action was postponed until Oct. 26, and the result of that would have been that, in the *Norman* case, the three months within which the insurance company had to start their action for a declaration would not have expired till Jan. 26, 1935, and they would have had twenty-five days in which to make up their minds whether they would start an action for a declaration or not. But in my opinion, when the section is properly considered, that makes no difference. I think that the statute contemplates that the insurance company shall have three months in which to make up their minds whether they will sue on a declaration or not. In the *Norman* case they have twenty-six days. I see no reason for cutting down the ambit of their protection in that case. The case, on the face of it, is not so obviously unjust as that of *Croxford*, but I think the same principle applies, namely, that all the obligations of an insurance company under sect. 10 are subject to all the privileges and exceptions and exemptions given them, and one of the exemptions given them is that they may get this declaration that the policy has been obtained by non-disclosure of a material fact and that they may have three months in order to get their declaration, and as they are here given only twenty-six days, it follows also that in their case they have not the full benefit of the section ; in other words, you cannot apply sect. 10 as to its burdens without equally giving to the person to be adversely affected the benefits of the section. That really concludes these cases, because in neither of these cases can it be said that three months were given to either insurance company to make up their minds whether they would or would not get a declaration, and that concludes both cases against the plaintiffs, because the result is that sect. 10 cannot be applied to either of these insurance companies, and both these cases being cases of non-disclosure of material facts, they cannot be brought within sect. 38 of the earlier Act, nor, of course, was there any liability on the insurance companies at common law, or by any other statute. But I must just add one or two matters which affect, more particularly, the *Norman* case. In the *Croxford* case the matters which I have here discussed seem to have been directly in issue, and no other matters strictly were raised. As I have said, I do not follow the reasoning of Horridge, J., and I do not agree with him when he says : "I cannot see why the defendants could not have taken proceedings under subsect. (3) to obtain protection under that section." It is a sufficient answer that they should not have done it, because the section at that time was not effectually in existence ; but with regard to the *Norman* case, I should mention this, that the case took a rather different course. In that case, the primary defence of the insurance company was that there never was, in the circumstances of the case, any contract between them and the assured at all covering the accident which was

the subject matter of the litigation. On that point LEWIS, J., has found, without any doubt at all, that that contention was right. I read from the head-note and it substantially states what LEWIS, J., had considered in great detail and at great length—

> Held: that the evidence showed there was no contract agreed upon between the parties to cover the lorry for any period including the time of the accident.

Of course, on that finding, the plaintiffs there would fail, because if there was no contract between the assured and the insurance company, *a fortiori* there was no liability between the insurance company and the third party. But it was alternatively said in the *Norman* case that there was here non-disclosure of a material fact and, as I have said, LEWIS, J., has found alternatively that that fact was well maintained; but he gave judgment solely on the ground, as I understand it, that there was no contract in existence at all, and that was sufficient for his purpose. But he does intimate that had that not been his conclusion, he would, notwithstanding his finding that the material fact had been concealed, have felt himself constrained to follow the decision of HORRIDGE, J., and hold that the insurance company would have been liable under sect. 10 of the 1934 Act. We have not thought it necessary here to bother Serjeant Sullivan to argue the question whether or not LEWIS, J., had evidence on which he could come to the conclusion that there was no contract between the parties, because in our view, having regard to the fact that we disagree with HORRIDGE, J., it is enough that LEWIS, J., has found alternatively that the fact that the policies—that is, the earlier policies—have been cancelled, is a material fact which was concealed, and that decides the *Norman* case as equally with the *Croxford* case against the plaintiff. But it by no means follows that had we taken, in the *Norman* case, a different view and agreed with HORRIDGE, J., that none the less, Mr. Croom-Johnson would not have been able to succeed in saying that LEWIS, J., was right in holding that there was no contract between the parties, and that in any case he would have had other material on which to support the judgment. Therefore, in the *Croxford* case the appeal is allowed, directly reversing the decision of HORRIDGE, J. In the *Norman* case, the appeal is dismissed.

SCOTT, L.J.: I agree with the judgment that has just been delivered by SLESSER, L.J., and it is not necessary for me to refer to the facts in detail or to cover so much ground as has been so carefully covered by my Lord, but I want to draw attention to certain differences between the two cases on their facts. A most important difference is that, in the *Croxford* case, on June 29, 1934, three weeks after the date of the accident, the insurance company repudiated liability on the ground that there had been material non-disclosure, and demanded back the certificate of insurance. The assured assented to the view that they were entitled to avoid the insurance contract, and returned

the certificate on July 12. The Royal Assent was not given to the Act of 1934 until July 31. Therefore, from the 12th to the 31st, the defendant, in the subsequent proceedings in the negligence action, was uninsured, and that aspect of the matter was not, in my view, considered by Horridge, J., in the court below. I cannot see how, if the person who had been insured ceased to be insured because the contract of insurance was actually cancelled, rescinded, by reason of non-disclosure, before the Royal Assent was given to the Act on July 31, it could possibly be said that the Act when it was passed had anything to do with the case. Therefore, on that ground alone, I think the appeal in the *Croxford* case ought to be allowed. But assuming that the question could arise in that case, which I do not think it can, it is the same question as arises in the *Norman* case.

The only other difference of importance between the two cases is that in the *Croxford* case, the writ in the negligence action was issued on Aug. 3, 1934, and the three months period referred to in sect. 10 (3) of the Act of 1934 would therefore have expired on Nov. 3, whereas, in the *Norman* case, the writ was not issued until Oct. 26, and that period would not have expired therefore until Jan. 26. We have had a good deal of discussion in the case about the principles of statute interpretation, and I cannot help feeling, and feeling strongly, that the temptation to call in aid principles of interpretation is too great for many people and often defeats its own purpose; at least, makes the principle defeat its own purpose. Where the words of an Act of Parliament are clear, there is no room for applying any of these principles of interpretation, which are merely presumptions in cases of ambiguity in the statute. Serjeant Sullivan said sec. 10 (1) is free from ambiguity and called in aid the principle that where the words of an Act of Parliament are quite clear, you must give them their natural meaning, and he cited two cases of practical injustice done by an Act of Parliament where the words of the Act were too clear to enable the court to avoid the injustice; but to cite cases of that kind does not take one anywhere. The whole question is whether the assumption made by Serjeant Sullivan that sect. 10 (1) is clear was a justifiable assumption. His submission was that the section indicates that it is to be read by itself as if sect. 10 subsects. (2) and (3) were not in the section at all. But the learned Serjeant is hoist with his own petard, because subsect. (1) says in terms that the right to recover from the insurer is subject to the provisions of the whole section. I really do not understand the relevance of the learned Serjeant's citation of cases where the language of the statute was completely self-contained, and it was not possible to introduce any controlling provisions of the statute in question to avoid what seemed to be an injustice in those cases. Here the subsection upon which he has to rely itself says: This section is subject to subsects. (2), (3) and

it may be, (4), (5) and (6), if we had to consider them. That being so, the rights conferred by subsect. (1) are only rights which can be enforced if the provisions of subsects. (2) and (3) do not prevent their being enforced. I entirely agree with SLESSER, L.J., that the provisions of subsect. (3) are intended to protect the insurance company from the liability of subsect. (1), if he carries out the directions of subsect. (3), which entitle him to immunity. If that is the true interpretation of the section, then the principle prayed in aid by Serjeant Sullivan falls to the ground. I should like to make this observation about the principle called in aid by the respondents' counsel in the *Norman* case, namely, that which is stated and explained in MAXWELL ON THE INTERPRETATION OF STATUTES, 7th Edn., page 186. That page seems to me to be an almost perfect statement of the principle that you do not give a statute retrospective operation unless there is perfectly clear language showing that it is intended by Parliament that it shall have a retrospective application. In sect. 10 I can see no justification whatever for the contention that any provisions of subsects. (1), (2) and (3) are intended to have any operative effect at all on a date before the order of the Minister of Transport under sect. 42 of the Act has brought the section into operation. Therefore, I am satisfied to base my judgment upon the view that the provisions of subsect. (1) have no operation in regard to any case until such a date after Jan. 1, 1935, when the Act was brought into operation, as shall leave time subsequent to Jan. 1, for all the conditions contained in subsects. (2) and (3) to be made effective in accordance with the detailed provisions as to time contained therein. That decision is enough to dispose of both cases, but in regard to the *Croxford* case, there is the further point that there was a period of time between the cancellation of the insurance on July 12 and the coming into force of the Act on July 31. In that case, the respondents in this court had really no argument upon which to base a contention that the Act could be treated as retrospective in regard to that period. But I can see no difference in principle between that period and the period of the next six months down to Jan. 1, 1935, except the principle, if it be a principle, which HORRIDGE, J., prayed in aid in the *Croxford* case. He said on page 416, and it is important to quote the words of his judgment:

> It was further pressed upon me that sect. 10 (3) shows that section could not be intended to apply to a cancellation of an insurance certificate before the Act came into operation, as it was suggested that proceedings could not be taken for the declaration mentioned in that Act before the Act came into operation. In this case, however, the Act of Parliament was known, as it had received the Royal Assent on July 31, 1934, and I cannot see why the defendants could not have taken proceedings under subsect. (3) to obtain protection under that section.

I do not think he could have invoked that consideration in regard to the

period between the cancellation of the insurance contract on July 12 and July 31, during which time the Act was only a Bill before Parliament and might have been sent back and amended in Parliament, might have been re-committed. Anyhow, I do not recognise any legal principle upon which that observation can be based.

I only want to add one further observation, and that is this: Under sect. 10 (3), the declaratory judgment has to be obtained in an action by the insurer, brought presumably against the assured, if the policy is still in force but voidable. He has to ask for a declaration that he is entitled to avoid it. If it has already been avoided on the ground of misrepresentation or non-disclosure of a material fact he is told to bring an action apparently against his assured to record past history and say that it is avoided. The statute says so, but I fail to see quite how that can really have been intended. If the two parties are in agreement that the contract was obtained by misrepresentation or non-disclosure, and have actually rescinded it, it seems a very difficult thing to understand why the unfortunate insurance company should have to go to the expense of bringing an action against the assured in order to get a judgment to that effect.

With those observations, I merely express my agreement with the judgment of Slesser, L.J.

Eve, J.: I entirely agree with the conclusion at which my Lords have arrived in each of these cases, and I do not think there is anything which I can usefully add to what they have already said.

Slesser, L.J.: In the *Croxford* case the appeal will be allowed with costs here and below, and in the *Norman* case, the appeal will be dismissed with costs.

Solicitors: *A. D. Vandamm & Co.* (for the appellants), *E. C. Kirby & Son*, agents for *E. Edwards & Son*, East Ham (for the respondents), in the *Croxford* case; *C. S. Tomlinson* (for the appellant), *Devonshire & Co.* (for the respondents), in the *Norman* case.

[*Reported by* Derek H. Kitchin, *Barrister-at-Law.*]

R. *v.* GOLDFARB.
R. *v.* SZCZENSLIVE.

[COURT OF CRIMINAL APPEAL (Talbot, Macnaghten and du Parcq, JJ.), **February 3, 10, 1936.**]

Criminal law—Recommendation for deportation—Stateless aliens—Recommendation made for other purposes.

Two aliens found guilty at the County of London Sessions of receiving stolen goods were natives of the late Russian Empire. At the date of their trial they were not recognised as nationals by the U.S.S.R., and were therefore stateless. The Deputy-Chairman of the London Sessions recommended that they should be deported. He knew that the recommendation could not be carried out, but intended by it to direct the attention of the Secretary of State to the question of whether he should make an order under the Aliens Order, 1920, Art. 11, imposing restrictions on the activities of the prisoners in this country.

HELD: the Deputy-Chairman had no jurisdiction to recommend deportation in these circumstances, and his recommendation should be quashed.

[EDITORIAL NOTE. The recommendation for deportation which was made for the acknowledged purpose of drawing the attention of the Secretary of State to the Aliens Order, 1920, Art. 11, was irregular although it seems to be a method which has been adopted on more than one occasion. As TALBOT, J., pointed out, the powers of the Secretary of State under Article 11 are independent of such recommendation. But this case must not be taken as deciding that where on some future occasion a stateless alien is convicted no recommendation for deportation can be made. It was only because the recommendation was held to be unnecessary for the carrying out of the Deputy-Chairman's intention, that the Court of Criminal Appeal gave effect to their opinion under Article 12 (7). Recommendations for deportation can be made notwithstanding the impracticability of carrying them out, for the machinery is vested not in the Court making the recommendation, but in the Secretary of State and under Article 21 (2) " . . . Where for any reason it is uncertain what nationality (if any) is to be ascribed to an alien, that alien may at the discretion of the Secretary of State either be treated as the national of the State with which he is in the opinion of the Secretary of State most closely connected for the time being in interest or sympathy or as being of uncertain nationality or of no nationality."

As to DEPORTATION OF ALIENS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 484-488, paras. 820-827, and DIGEST, Vol. 2, pp. 194-197, Nos. 542-553.]

APPEAL by two convicted aliens against recommendation that they be deported, made by SIR HERBERT WILBERFORCE, Deputy Chairman, at the County of London Sessions, on Dec. 13, 1935, in passing sentence upon them.

J. Goldfarb and A. J. Szczenslive were, on Dec. 13, 1935, convicted before the County of London Sessions of receiving stolen goods, and were sentenced to imprisonment.

In giving evidence of the previous record of the prisoners, a police inspector said that Goldfarb was born at Riva, then in Russian Poland,

and Szczenslive was born at Vilna, in Russia. The Government of the U.S.S.R. does not recognize as its nationals persons who were citizens of the late Russian Empire unless they fulfil certain special obligations, and the prisoners were therefore stateless persons. After the passing of sentence, Counsel for the Crown formally asked for a deportation order, adding that it quite clearly could not be enforced. The learned Deputy-Chairman said he understood that the object of the order was to enable restrictions to be placed upon the energies of the prisoners. Counsel observed that even this would depend upon the Home Secretary, and the Deputy-Chairman agreed, adding that he thought that the Home Secretary could do so without any recommendation from the Court.

He recommended both prisoners for deportation.

Both prisoners appealed against the recommendation.

T. R. Fitzwalter Butler, for the appellant Goldfarb: The jurisdiction of the Secretary of State to make an order under the Aliens Order, Art. 11, has nothing to do with any court; he can act *proprio motu*. A recommendation for deportation can only be made in circumstances in which it can be carried out. As both these men are stateless, neither can be deported.

G. Raphael, for the Crown: The Secretary of State's powers to order deportation are contained in the Aliens Order, Art. 11. When an alien is convicted before a criminal court, it is the practice of counsel appearing for the Metropolitan Police to draw the attention of the presiding judge to the fact that the man is an alien, with a view to the judge making a recommendation for deportation if he thinks fit. The judge's opinion is better founded than could be that of a civil servant who has only the papers before him. As a matter of practice, there are some aliens who cannot be deported, such as the two prisoners. In such cases the consideration which influences the Home Secretary in deciding what ought to be done is whether the prisoner is or is not an alien who, in the opinion of the presiding judge, ought to be deported. It is a matter of convenience to the Home Office to know the view of the presiding judge.

The prisoner Szczenslive was present, but not represented.

Talbot, J.: These two men were both convicted at the London Sessions of receiving stolen goods, knowing them to be stolen. The only thing with which we are dealing on this occasion—the only point on which we gave leave to appeal—arises because, in addition to certain sentences of imprisonment (with which we are not concerned), there was in each case a recommendation that an order for deportation be made. That is a recommendation to the Secretary of State, who is the person who has the power, if he thinks fit, to make such an order.

We were told on Monday last, and we have been told again to-day, that by reason of the prisoners' place of origin, there is no practical mode

by which an order for deportation could be executed. It is clear from the record of the proceedings that the learned Deputy-Chairman was quite correctly informed and knew the law correctly: that is to say, that the Court had nothing to do with the matter which I am just about to mention; but he included these recommendations in his judgment, perhaps rather encouraged thereto by the police, with the idea of facilitating the making of quite a different class of order by the Secretary of State. There is an article in the Aliens Order, 1920, which has statutory authority by which the Secretary of State is empowered to impose by order on an alien such restrictions as to residence, reporting to the Police, registration, the use or possession of any machine, apparatus, arms, explosives, or other article or otherwise as he may deem to be necessary in the public interest. If he does make such an order, the alien has to comply with its terms.

That article obviously has nothing to do with deportation, because it would be carried into effect not in any foreign country, to which deportation might be ordered in another case, but in this country. There is no need to lay that down as a matter of law, on the construction of this article, but that apparently is its main object. It has nothing to do with any conviction or any intervention by any court, but is a power which is conferred on the Secretary of State as such. As far as I know, there is no restriction or limit other than the terms of the article itself, to fetter his discretion in the matter.

What has happened, therefore, in this case is this. Not by way of any expression of opinion, but by way of a formal action of the court in dealing with these cases, there has been a recommendation to the Secretary of State to make a deportation order—which for all practical purposes, apparently he has no power to do—in order that he may be the more likely to make the order under Art. 11. We think that this, on the face of it, is a very unsatisfactory way of dealing with these cases, or any other case. Although, of course, there is nothing to prevent as far as I know, this learned judge, or any other, from saying anything by way of indication of his own opinion in passing sentence on any alien who has been convicted. But now that it has become clear that the court has no occasion to deal with this matter at all, we think it very unsatisfactory to leave this recommendation for deportation as a thing which is to be formally transmitted to the Secretary of State.

There is a provision in the next Article of the Aliens Order, 1920, namely, Art. 12, which deals with the deportation of aliens and appears to indicate the proper form in which we should give effect to our opinion.

Art. 12 (7) lays down:

> Where any case in which a court has made a recommendation for deportation is brought by way of appeal against conviction or sentence in any higher court.

That what is happening in this case: there was a recommendation by

the learned Deputy-Chairman of the Sessions and the case has been brought by way of appeal against the sentence before this court—

> . . . and that court certifies to the Secretary of State that it does not concur in the recommendation, such recommendation will be of no effect but without prejudice to the power of the Secretary of State to make an order for deportation under the last foregoing provision.

That is the provision under which, here as in other cases, the Secretary of State, whatever he may do or not do, has power to make a deportation order against an alien if he deems it to be conducive to the public good to make it. So we think that, in the circumstances which we now know, we ought not to concur in the recommendation, for the reasons which I have indicated. We express no opinion at all as to whether, if these people could be deported to some country—which, we understand, it is agreed that they could not—either of these cases would be a proper case in which a deportation order should be made. What the learned Judge did was on the understanding that in fact neither of these men would be deported. Equally, we desire to indicate no opinion at all—because it is not within our province, nor was it within the province of the learned Deputy-Chairman in the court below, to do so—whether either of these men is or is not a proper subject for an order of some kind under Art. 11 of this Order. Further, we think that we ought, under the language of Art. 12 (7), to certify to the Secretary of State that we do not concur in the recommendation made by the court below.

Appeal allowed; recommendation for deportation quashed.

Solicitors: *W. T. Donovan* (for the appellant); for the Crown, *The Commissioner of Police.*

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

Re KINGCOME'S WILL TRUSTS, HICKLEY *v.* KINGCOME.

[CHANCERY DIVISION (Bennett, J.), **February 4, 1936.**]

Annuity—Free of tax—Annuitant entitled to relief—Recovery of tax—Compelling annuitant to recover tax.

A testator by his will gave his widow an annuity "free of tax." The full income tax having been paid by the trustees, the latter required the widow to sign the necessary forms to recover such repayment of tax as the widow's income entitled her to and to pay the same to them. The widow refused to sign any form or claim and a declaration was sought that the widow was not only a trustee of the recovered money, but also of the statutory right to recover the same.

HELD: the declaration ought to be made in the terms asked.

[**EDITORIAL NOTE.** The difficulty here is that the annuity "free of tax" being the only income of the widow she has no interest in recovering such tax as is recoverable in respect of it. If she recovers it, she must, under the rule in *Re Pettit* [1922] 2 Ch. 765, pay it over to the trustees and that being so she has refused to take any step towards its recovery. The declaration made on this summons is the first step only towards its recovery and apparently further proceedings will be required before the tax is recovered.

AS TO THE RULE IN *Re Pettit*, see HALSBURY, Supplement to Vol. 24, para. 974; and FOR THE CASE, see DIGEST, Vol. 39, p. 167, No. 587.]

Case referred to:

(1) *Re Pettit, Le Fevre* v. *Pettit* [1922] 2 Ch. 765; 39 Digest 167, *587*.

SUMMONS for directions as to administration of trusts of testator's will and a declaration that the widow, an annuitant under the will, should hold certain sums recoverable by her from the Commissioners of Inland Revenue as trustee for the estate, for the benefit of other and subsequent legatees and annuitants under the will.

A. J. Belsham for the plaintiff.

C. V. Rawlence for the first defendant, the widow of the testator.

J. H. Stamp for certain of the other defendants, also annuitants and legatees under the will. An annuitant under a will is *ipso facto* a debtor to the Crown for the whole amount of tax payable upon that annuity. Where money has had to be paid, under that principle, by trustees to the Inland Revenue Commissioners, it is, when recoverable, to be regarded as money paid by the estate and to be held in trust for the estate and not for the annuitant upon whose annuity it was so paid.

When an annuity under a will is given "free of tax" and the annuitant, under the Income Tax Acts obtains relief by way of repayment of tax paid in excess, the residuary estate is entitled to such proportion of the sum repaid as the annuity bears to the total income of the annuitant: *Re Pettit* (1). The principle is clear. Where a person is trustee of the recovered sum he must also be trustee of the means of getting it.

Rawlence for the widow: To grant the declaration sought would be carrying *Re Pettit* (1) a definite step further, more particularly as in *Re*

Pettit (1) the money had already been recovered from the Commissioners, whereas here it was sought to make the first defendant recover it, which had not yet been done, and then to hold it as trustee for the estate.

Bennett, J.: A testator by his will gave to his trustees certain shares held by him in a limited company upon trust to be retained by them for a certain period and by clause 4 the testator directed his trustees out of the income of the said shares to pay each year after his death, in priority to all other annuities, an annuity to his wife of £365 clear of all death duties and income tax, and subject to that annuity the testator also directed various other annuities and legacies to be paid to beneficiaries some of whom are defendants in the present summons, these others to rank *pari passu* and to abate equally all round if there should be insufficient funds to satisfy all.

Under the terms of the will the wife's annuity has to be paid clear and free of income tax and the trustees must pay her £365 upon each pound of which the proper tax has been duly paid. According to the evidence the widow's only income is this annuity and the result is that she has a right to claim from the Inland Revenue for the return of some tax paid by the trustees on her annuity.

The law in this matter is laid down by Romer, J., in the case of *Re Pettit* (1) and it is that if she made a claim and received repayment, that sum recovered would be held by her upon trust for the trustees of her husband's will and would be available to make any deficiency good and to assist in paying annuities ranking after hers.

Now for some reason or other the widow, the first defendant, has refused to make the claim upon the Commissioners of Inland Revenue which she is entitled to make. Whether this is from ignorance or stupidity or obstinacy on the part of the old lady I do not know, nor does it very much concern me, but I do not see why the other beneficiaries should suffer for it, whatever it is, and if the court can overcome it and recover the tax for the other annuitants it clearly and equitably ought to help.

Mr. Stamp for some of these annuitants suggested that I should make a declaration that the first defendant is a trustee not only of the recovered money but, carrying *Re Pettit* (1) one stage further, also of the statutory right to recover it, and that she is bound, upon the request of the trustees, to sign the necessary document or form for its recovery. Although I do not know what the exact effect of such a declaration will be, and there may have to be further proceedings, I see no objection to it and make it accordingly.

Solicitors: *Clowes, Hickley & Heaver* (for the plaintiff and the defendants other than the widow of the testator); *Marson & Toulmin* (for the first defendant, the widow of the testator).

[*Reported by* Charles E. Eden, Esq., *Barrister-at-Law.*]

Re WILLIAMS, WILLIAMS *v.* TEMPLETON.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.), **February 5, 1936.**]

Will—Construction—Direction to set aside fund—To produce annuity without deduction of tax.

W., by his will, directed his trustees to set aside out of his residuary estate such proportion thereof as should be sufficient "to provide an income of £1,000 per annum (without deduction of income tax)":—

HELD: the words "without deduction of income tax" must be construed in their natural meaning to mean that the income is to be a clear net sum of £1,000, which is to be undiminished in the hands of the beneficiary by the deduction of tax.

[EDITORIAL NOTE. There are many authorities dealing with the payment of annuities "free from tax," "free from deduction" and similar phrases, but there seems little guidance where a fund has to be set aside to produce a stated income without deduction of tax. The judgment of ROMER, L.J., deals with the point that income tax varies from year to year.

THIS CASE MAY USEFULLY BE COMPARED WITH HALSBURY, Hailsham Edn. Vol. 17, p. 258, para. 526, and see DIGEST, Vol. 28, p. 76, Nos. 410, 411.]

SUMMONS by the trustees of the will of the late Frederick Ernest Williams to determine *inter alia* the construction of a clause in his will, which is fully set out in the judgment of LORD WRIGHT, M.R. The judgment of LUXMOORE, J., given on May 8, 1935, is so far as it is material also stated in the judgment of LORD WRIGHT, M.R. The defendant, Joan Margaret Williams, appealed.

A. F. Topham, K.C., and *J. L. Stone*, for the appellant.

R. W. Jennings for the respondents, the trustees.

H. B. Vaisey, K.C., and *W. T. Elverston* for the other respondents.

LORD WRIGHT, M.R.: This is an appeal from a decision of LUXMOORE, J., and concerns the construction of a will. The testator devises and bequeathes all his real and personal estate to his trustees on trust for sale and conversion and to invest. Then follows the provision "shall set aside out of my residuary trust estate such proportion thereof as shall be sufficient to provide an income of £1,000 per annum (without deduction of income tax) and shall pay such income to my said wife during her life and after her death in trust as to both capital and income thereof for my said adopted daughter Joan Margaret Williams for her separate use."

The dispute turns on the words "without deduction of income tax." The learned Judge states the question as being whether the £1,000 income is to be a gross or a net sum. He says:

> If the provision had simply been to provide an income of a thousand pounds

per annum and there had been no reference to deduction of tax at all, the amount which would have had to be set aside would be a sum sufficient to produce a thousand pounds per annum gross, and income tax would in the ordinary course have been deducted from it. Does the fact that there is a reference to deduction of income tax make it clear that the testator was directing that the sum to be set aside was what I may refer to as a net sum as opposed to a gross sum ? The words with reference to income tax are " without deduction of income tax." I think if the words had been " with deduction of income tax " there could not have been any question but that the thousand pounds was a net sum, and I think, looking at the whole of the will, the better view is that " without deduction of income tax " is really used as the converse of " with deduction of income tax " ; and that as " with deduction of income tax " would direct that something was to be done with regard to income tax, " without deduction of income tax " means that nothing had to be done with regard to such deduction, and my opinion on the proper construction of this will is that the sum to be set aside is a sum which will produce by its income a sum of a thousand pounds before any income tax is deducted from it.

I cannot with great respect to the learned Judge agree with this view, for in my opinion it gives no effect to the words " without deduction of income tax."

" Without deduction of income tax " means there is to be a clear net sum and no deduction of income tax is to be made from it. This is seen more plainly if the main provision of the will is considered. The £1,000 is to be the income of the widow available out of certain property. There has to be set aside a certain proportion of that property to provide this income of £1,000. I see no ground for giving to the words any other meaning than the natural one. It is to be a clear sum of £1,000 and no tax is to be deducted.

Romer, L.J. : Under the terms of this will the trustees were directed to set aside a certain sum for the beneficiary, that is the widow. This sum was to produce £1,000 per annum, without any deduction of income tax. It cannot be anything else than a net sum. It is said that this would lead to difficulties ; but all the trustees have to do is to set aside a sum which *at that time* would produce £1,000 after income tax had been paid. If the rate of income tax thereafter rises so much the worse, and if it falls, so much the better for the beneficiary.

Greene, L.J. : The income which is to be provided for is one of £1,000, which is not to be liable to diminution in the hands of the beneficiary by reason of income tax. £1,000 free of income tax means £1,000 must reach the hands of the beneficiary without responsibility in the matter of tax.

Appeal allowed.

Solicitors : *Emmet & Co.* (for the appellant) ; *Hall, Sich & Jasper* (for the respondents, the trustees) ; *Soames, Edwards & Jones* (for the other respondents).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

SUTHERLAND PUBLISHING COMPANY, LIMITED *v.* CAXTON PUBLISHING COMPANY, LIMITED.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.), **February 7, 1936**]

Copyright—Infringement—Damages—Damages for infringement and conversion Cumulative or alternative—Copyright Act, 1911 (*c.* 46), *ss.* 6 *and* 7.

In an action for an alleged infringement of the plaintiffs' copyright in a certain publication, the plaintiffs claimed (*inter alia*) an inquiry as to (i) damages suffered by reason of the infringement and (ii) damages for conversion. The defendants admitted the infringement, but contended that the remedies given by the Copyright Act, 1911, ss. 6 and 7 were alternative and not cumulative and that the plaintiffs must elect their remedy.

HELD: (i) the remedies were cumulative and not alternative and the plaintiffs could recover damages under both sections. Each claim was in respect of a different wrong, the former for a wrong done to an incorporeal right, the copyright; and the latter for conversion of particular chattels, the infringing copies, which by sect. 7 are deemed to be the property of the plaintiff.

(ii) in assessing damages under the two heads, the tribunal making the assessment must avoid any overlap; but, in general, the damages for conversion will be the value of the chattels converted.

[**EDITORIAL NOTE.** This case decides practically for the first time the question left open in *Birn Bros* v. *Keene & Co.*, [1918] 2 Ch. 281, and apparently decided without full argument in *Austin* v. *Columbia Graphophone Co.* (1923), as reported in *Macgillivray's Copyright Cases* (1923-1928) 398, at p. 421. The view taken by the Court in this case is the view expressed in HALSBURY, 2nd Edn., Vol. 7, p. 592, note (5). The question of assessment of damages is also dealt with in the case, though in general terms and, no doubt, this must in time become the subject of further authory.

AS TO DAMAGES IN COPYRIGHT CASES, see HALSBURY, 2nd Edn., Vol. 7, pp. 591-593, para. 917-919, and for the cases see DIGEST, Vol. 13, pp. 220, Nos. 568-577, and for the Copyright Act, 1911, ss. 6 and 7, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 3, pp. 728-730.]

Cases referred to:

(1) *Marsh* v. *Keating* (1834), 1 Bing. N.C. 198; 1 Digest 65, *535*.
(2) *Brewer & Gregory* v. *Sparrow* (1827), 7 B & C. 310; 43 Digest 535, *1704*.
(3) *Burroughs* v. *Bayne* (1860), 5. H. & N. 296; 43 Digest 471, *106*.
(4) *Cooper* v. *Chitty* (1756), 1 Burr. 20; 43 Digest 464, *1*.
(5) *Neilson* v. *Betts* (1870), L.R. 5 H.L. 1; 20 Digest 236, *41*.
(6) *Austin* v. *Columbia Graphophone Co.* (1923) 67 Sol. Jo. 790; Digest Supp.; here referred to in MacG. Cop. Cas. (1923-1928) 398.
(7) *Birn Brothers* v. *Keene & Co.* [1918] 2 Ch. 281; 13 Digest 220, *573*.

APPEAL by the plaintiffs, Sutherland Publishing Co., Ltd., from a decision of FARWELL, J., made on Nov. 6, 1935, who, on a special case for the opinion of the Court, held that, on an admitted infringement by the defendants of their copyright, the plaintiffs were not entitled to recover both damages for infringement under the Copyright Act,

1911, s. 6, and damages for conversion under sect. 7 of that Act, the remedies given by those sections being alternative and not cumulative.

The arguments and facts appear from the judgments.

K. E. Shelley for the appellants.

Hon. S. O. Henn Collins, K.C., and *E. J. Macgillivray* for the respondents.

Lord Wright, M.R.: This is an appeal from an order or declaration made by Farwell, J., on a question of law raised on the defence of copyright in a work entitled "Heating and Ventilating" brought the action against the defendants, who publish a work dealing in part with the same subject, alleging that the defendants have infringed their copyright by taking from the plaintiffs' work a substantial part and including it in a book published by themselves and have printed and sold numerous copies of their book.

The plaintiffs claimed an injunction and also an inquiry as to damages; they also claimed delivery up of all infringing copies and material. The relevant claim for this purpose is item 2:

> An inquiry as to damages suffered by the plaintiffs by reason of the defendants' infringements and conversion by their publication of a book entitled "Modern Practical Plumber, Volume III" and payment of the amount found due.

The defendants in their defence admitted that they had infringed the plaintiffs' copyright and offered to submit to judgment in the terms set out in para. 5 of the defence.

The defence thus raised the point of law which was submitted to the Court, conveniently if perhaps informally. They contended that the remedies given by the Copyright Act, 1911, s. 6, were alternative to those given by sect. 7, and that the plaintiffs had an option to recover under the former section damages for breach of copyright, or under the latter section damages for conversion, but could not recover cumulatively under both sections.

Sects. 6 and 7 are in the following terms:

> 6 (1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right.
>
> 7. All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof, or in respect of the conversion thereof.

At first sight it might appear on reading these two sections that they severally give both cumulative rights and cumulative remedies, sect. 6 dealing with the remedies, legal and equitable, appropriate to the infringement of the incorporeal right of copyright defined by sect. 1 (2)

of the Act, and sect. 7 giving a special and distinct right to claim in detinue or for damages in conversion in respect of the infringing copies which are by the section deemed to be the property of the owner of the copyright.

FARWELL, J., has, however, come to the contrary conclusion and has declared that the plaintiffs have no right in this action to recover both damages for infringement of copyright and damages for conversion. Hence this appeal. The learned Judge has come to this conclusion on the footing that in an action for conversion of goods the plaintiff is claiming from the defendant on the footing (to quote his words):

> that the dealing with the property by the defendant is a dealing by the defendant as his, the plaintiff's agent, and that he is entitled to recover from the defendant, as his agent, the proceeds of sale or other consideration obtained for the goods.

The learned Judge thereupon concludes that the remedy under sect. 6 which is given for the wrongful act of trespass to the plaintiffs' copyright is inconsistent with the remedy under sect. 7 which, in the Judge's opinion, is based on the footing that the defendant was acting as the plaintiffs' agent. Hence, in his judgment, the two remedies cannot be pursued together, but the plaintiffs must elect at least before judgment.

I find myself unable, with all respect, to concur in this conclusion. I do not for the moment observe that sect. 7 is not limited to conversion but includes detinue, and is not limited to claims against the infringer of the copyright. Thus an innocent bookseller may be sued under that section. But dealing only with conversion, it is perfectly true that when goods are converted, the plaintiff may have a right instead of suing in conversion to waive the tort and sue as for money had and received (see, for instance, *Marsh* v. *Keating* (1), and *Brewer & Gregory* v. *Sparrow* (2)), and if he does so he cannot also treat the act as wrongful. And the measure of the claim is different. In conversion, the damages are the value of the goods at the time of conversion, whereas the claim for money had and received is for the actual proceeds, which may be more or less than the value. But in the present action the claim under sect. 7 is limited under that section to conversion, that is, it is a claim for a tort. Perhaps some confusion may have arisen from the fact that the action in trover or conversion originally involved a fiction that the goods converted had lawfully come into the possession of the defendant before he converted them. That fiction was devised, like others, by the common law to avoid a technical difficulty. Apart from such a fiction, the proper form of action would have been in detinue, which involved the inconvenience to the plaintiff that in detinue the defendant was entitled to wage his law. (See per MARTIN, B., in *Burroughs* v. *Bayne* (3), at p. 301). The fiction was that the defendant had found goods which the plaintiff had never lost and the defendant

had never found. But the Courts early treated these allegations as fictitious and prohibited the defendant from traversing either. It was in this sense that Lord Mansfield in *Cooper* v. *Chitty* (4), at p. 31, says of trover or conversion :

> In form it is a fiction : in substance a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and has been brought in many cases where, in truth, the defendant has got the possession lawfully. Where the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten. Hence, if the defendant delivers the thing upon demand, no damages can be recovered in this action, for having taken it. This is an action of tort : and the whole tort consists in the wrongful conversion.

This passage makes it clear that conversion was essentially a tort. That was never waived. What might be waived was the trespass involved in wrongfully taking the goods. In fact that trespass had in many cases been committed as well as the subsequent conversion.

I may also observe that the fiction itself was abolished by the Common Law Procedure Act, 1852, s. 49.

The Copyright Act, 1911, must be considered with reference to the relevant law relating to conversion as at the date of the Act, and hence the fiction on any view could not now be regarded for any purpose, and furthermore the forms of action were abolished by the Judicature Act, 1873. Accordingly, I must reject the idea that there is the inconsistency which the learned Judge finds between the remedies under sect. 6 and sect. 7.

No doubt in certain circumstances under these sections a plaintiff may be compelled to elect between different remedies. Thus under sect. 6 he may not claim both damages and an account of profits. These from their very nature, are true alternatives. As Lord Westbury pointed out in *Neilson* v. *Betts* (5), at p. 22, " the two things are hardly reconcilable for if you take an account of profits you condone the infringement." But, though this is so in its limited application, as I have sought to explain, there is no such irreconcilability between a claim for damages for infringement and a claim for conversion of infringing copies. Both are claims for a wrong, each wrong being different from the other. The former is for a wrong done to an incorporeal right, copyright, the latter is for conversion of particular chattels, the infringing copies. The measure of damages is different. In the latter case the measure is the value of the copies, which by force of the statute are deemed to be the property of the plaintiff, from the mere fact of being brought into existence ; whereas in the other case, the measure of damage is the depreciation caused by the infringement to the value of the copyright, as a chose in action.

It was strenuously contended that where the infringement consisted in the multiplication and sale of copies of a work, the damages under the two sections would overlap and the injustice of giving double compensation would be committed. It may be true that in some cases there may be an overlapping of the damages under the two sections, but, as I have already explained, there are two separate and diverse causes of action, each of which must receive appropriate consideration when it comes to the question of damages. It is easy to give illustrations to show how necessary it may be in order to do justice to give compensation under each section. The value of a copyright may be seriously depreciated by the issue of a cheap and inferior infringement which vulgarises the work. There is no reason in fairness why the plaintiff should not have full damages for this injury, and also have such further damages as the statute gives under sect. 7. On the other hand, the infringer may have reproduced a very few copies of high intrinsic value, which amounts to much more than the damage done to the copyright, which may be almost negligible. Each claim must receive its appropriate valuation. It must be left to the good sense of the tribunal which assesses the damages to avoid giving excessive damages. Damages given under sect. 6 may be in some cases modified by having regard to damages recoverable under sect. 7, which would generally be fixed by the strict rule awarding the value of the chattels converted. But in some cases there may be no inter-relation at all, as, for instance, where a dramatic or musical work is infringed both by performance and by multiplying copies, or a picture by being exhibited and by being reproduced.

It may further be noted that claims under sect. 7 may be brought in detinue or conversion against other parties than the infringer in addition to and perhaps subsequently to and independently of claims against the infringer.

Apart from an order made by ASTBURY, J., in *Austin* v. *Columbia Graphophone Co.* (6) there is little help to be obtained from the authorities in these Courts. The relevant passage in that report is at p. 421 and is as follows:

> Some discussion followed as to the relief which ought to be granted to the plaintiff. Defendants' counsel conceded that on the judgment the plaintiff was entitled to an order for an injunction, delivery up of copies, and damages for infringement of copyright, but the plaintiff claimed that, in addition to damages for infringement of copyright, he was entitled to damages for conversion on the basis that the infringing records were infringing copies of the plaintiff's work, and therefore the property of the plaintiff, as provided by sect. 7 of the Copyright Act, 1911. The learned judge held that the plaintiff was right, and gave him judgment accordingly with costs.

But in *Birn Brothers* v. *Keene & Co.* (7) where the sole question was whether the order for the inquiry into damages covered damages under both sects. 6 and 7, PETERSON, J., in deciding that the order was on

its true construction limited to sect. 6, clearly distinguished between the two heads. "The damages to be assessed," he said, "are not the damages occasioned by the sale of copies, but damages occasioned by reason of the defendants having infringed the copyright." He had no occasion to say precisely whether the two heads of damages were cumulative or alternative, but the reasons justifying the former view were very clearly set out in the argument of the late Lord Tomlin, then Mr. Tomlin, K.C., at p. 283.

It is true that under sect. 7 the remedies in detinue and in conversion may be alternative, and a remedy in detinue will be inconsistent and excluded by an order for delivery up of the infringing copies, which is an equitable remedy ancillary to the grant of an injunction and is limited to delivery up for destruction, whereas an order in detinue gives possession of the copies to the copyright owner in virtue of his statutory property in them. But in either case the effect is the same. The remedy is by a different legal method devised to prevent a stranger from acquiring, taking or selling infringing copies, which is a wrong additional to the infringement of the copyright.

The plaintiff in the present action has distinguished his claim for conversion, which is in respect of copies sold, from the claim he has made for delivery up of copies in the defendants' possession.

The further point of law raised in the defence under the Copyright Act, 1911, s. 10, which deals with limitation, has not been discussed and I express no opinion on it.

In the result, the appeal will be allowed, the order of the Judge set aside, and in lieu thereof it will be declared that the plaintiffs have the right to recover in this action both damages for infringement of copyright and damages for conversion. The plaintiffs will have the costs of this appeal and the costs of the proceedings in the Court below

Romer, L.J.: The plaintiffs in this case are the owners of the copyright in a literary work. The defendants have admittedly infringed that copyright by printing and publishing a book that reproduces a part of the plaintiffs' work, and have sold or otherwise disposed of a number of copies of such book. The plaintiffs are consequently entitled to include the right to recover damages sustained by them by reason of such infringement. But by virtue of sect. 7 of the Act yet another consequence results from infringement of copyright. [His Lordship read sect. 7.]

The question that arises upon this appeal is whether the plaintiffs are entitled to recover damages for the conversion by the defendants of the infringing copies disposed of by them in addition to the damages occasioned by the infringement of their copyright.

The question was decided by Farwell, J., adversely to the plaintiffs. He held that the remedies given by sects. 6 and 7 respectively are

alternative remedies and that a plaintiff cannot avail himself of both. His reason for so holding was that if a plaintiff asks for damages for conversion under sect. 7 he must be taken to have waived the tortious infringement of copyright. The learned Judge did not, of course, mean that by asking for damages for conversion a plaintiff waived all his rights under sect. 6. Obviously, a plaintiff can obtain at one and the same time an injunction under sect. 6 and damages for conversion under sect. 7. So, too, in the case of a dramatic work, copyright in which may have been infringed both by a performance of the work in public, and by printing and selling copies of the work, I cannot doubt that the owner of the copyright could obtain damages under sect. 6 for the first of these two acts of infringement, and also damages under sect. 7 for the conversion of the copies. But what I understand the learned Judge to deny is that the owner of the copyright, in such a case, can obtain damages for the second of the two acts of infringement and damages for the conversion of the copies. He considers, as I read his judgment, that by asking for damages for conversion the owner of the copyright waives the infringement occasioned by the printing and selling of the copies, and that to this extent the remedies given by the two sections are alternative. With all respect to the learned Judge, I am unable to concur in this view. Both sections occur in that part of the Act which is dealing with civil remedies for infringement of copyright, and I can find nothing in the words of the Act suggesting that the remedies were not intended to be cumulative. I have, indeed, already mentioned cases in which a plaintiff might desire to avail himself of both sections, and I can see no reason why he should not do so. Nor can I think that a plaintiff who seeks to avail himself of the remedies given by sect. 7 waives in any way or to any extent the tortious infringement of his copyright. It is only infringing copies that are to be deemed to be the property of the owner of the copyright. If he waives the infringement, he must necessarily treat the copies as non-fringing, and in that case will not be deemed to have any property in them at all. As I read the Act, an infringer not only renders himself liable to the remedies given by sect. 6, but also renders himself liable to have all infringing copies and all plates used or intended to be used for the production of such copies deemed to be the property of the owner of the copyright to the extent that the owner may take proceedings for the recovery of possession of them or damages for their conversion.

I may observe in passing that on this view of sect. 7 it is arguable that any such proceedings are proceedings taken in respect of the infringement of copyright within the meaning of sects. 8 and 10. But as this point does not arise upon the present appeal, it is unnecessary to consider it further. The only question for the moment is whether the remedies are alternative remedies, and in my judgment they are not.

But though the rights given by sect. 6 are not alternative to those given by sect. 7, it must, as it seems to me, often happen that where an owner of copyright obtains damages under the former section, he can recover nothing further in respect of damages under the latter. If, for instance, the defendant in the action has sold 500 infringing copies of a literary work, the owner of the copyright may justly be considered to have been thereby deprived of the opportunity of selling 500 copies of his own work, and the damage so occasioned to him will form part of the damages he will recover under sect. 6. But the damages that he has sustained will not be increased by deeming the infringing copies to be his property unless an infringing copy is worth more than one of his own. For by receiving damages under sect. 6 he will already have been placed in the same position as he would have been in if the infringing copies were in fact his and were of the same value as the original copies. The loss of the opportunity of selling 500 of his own copies will not necessarily be the only damages occasioned to his copyright by the infringement. This, however, is immaterial for my present purpose, which is to show that unless the infringing copies are worth more than the genuine ones, sect. 7 puts the owner of the copyright in no better position than he is placed by sect. 8.

But these are matters to be considered by the tribunal that is called upon to assess the damages, and do not affect the decision to be given upon this appeal, which, for the reasons given, should, in my opinion, be allowed.

Greene, L.J.: I agree. There is, in my judgment, nothing in the language either of sects. 6 or 7, or of any other section of the Act, which suggests that the remedies conferred by sects. 6 and 7 are alternative and not cumulative.

Sect. 6 sets out the remedies for infringement, that is (see sect. 2 (1)) the doing of an act the sole right to do which is conferred on the owner of the copyright by sect. 1, or the doing of any of certain further acts specified in sect. 2 (2). In other words, the remedies specified in sect. 6 are remedies in respect of the infringement of the incorporeal right vested in the owner of the copyright, a wrong which does not and could not in itself give rise to any remedy based on an actual or notional property in the infringing copies vested in the owner of the copyright. This latter remedy is conferred by sect. 7 and the necessary foundation for it is laid by providing that the infringing copies "shall be deemed to be the property of the owner of the copyright." The remedies are different, the wrongs for which they are remedies are different, the subject matters in respect of which the wrongs are committed are different. In these circumstances it would, in my judgment, have required clear language in the statute to make the two remedies alternative.

Speaking for myself, and with great respect for the judgment of the

learned Judge who thought otherwise, I do not think that there is any inconsistency in the attitude of a plaintiff who says at the same time that by making copies the defendants have infringed his copyright, and that the copies when made are to be treated as his property. Indeed, this appears to me as a matter of construction exactly what the sections permit. But in a case where damages are awarded in respect both of the infringement and of the conversion the tribunal which fixes the damages must be careful to see that no injustice is done. Damages under the two heads may or may not overlap in whole or in part. In so far as they do overlap that circumstance must, in my judgment, be taken into account. As an example of what I mean by overlapping let me take the following case. The owner of a copyright in a book proves that whereas if it had not been for the infringement he could have sold 1,000 copies, he has only been able to sell 500, the infringer having printed and sold 500 copies. Now here it is obvious that as the possible market for the book is limited to 1,000 copies, if the damages for infringement under sect. 6 are fixed on the basis that the copyright owner would have sold 1,000 copies but for the infringement and at the same time the value of the 500 copies sold by the infringer is fixed for the purposes of sect. 7 at the amount for which they were sold, the result will be that the copyright owner will have recovered damages on the footing that there was an available market for 1,500 copies instead of the real market for 1,000 copies only. If he had sold 1,000 copies there would have been no market for the 500 copies made by the infringer which would accordingly have had no value. Conversely, if the 500 copies sold by the infringer were worth what they were sold for this could only be so on the basis that the copyright owner was only going to sell 500. In such a case it appears to me that to award to the copyright owner damages for infringement based on his inability to sell 500 copies and at the same time to award him damages based on the sale price of the 500 copies sold by the infringer would not be permissible.

Solicitors: *White & Leonard* (for the appellants); *Oswald Hickson, Collier & Co.* (for the respondents)

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*

TIMPSON'S EXECUTORS *v.* YERBURY.

[Court of Appeal (Lord Wright, M.R., Romer and Greene, L.JJ)
January 31, 1936.]

Income Tax—Foreign trust fund—Life tenant resident in England—Revocable mandate to transmit part of income to named persons in England—Income of life tenant—Income Tax Act, 1918, *Sched. D, Case V, r.* 2—*Miscellaneous Rules applicable to Sched. D, r.* 1—*Finance Act*, 1922, *s.* 18.

Mrs. T., a resident in the United Kingdom, was entitled to the income of a trust fund in New York State, and the trusts of the fund fell to be administered by the law of that State. From time to time she instructed the trustees to make certain payments (being part of the income of the said trust fund) by way of annual allowance to her children who were also resident in the United Kingdom. The trustees carried out these instructions by obtaining a sight draft in sterling on a bank in London for the amount payable to each child, and the draft was then sent to the child in question. The trustees then duly debited Mrs. T.'s account with the proper sum in dollars These annual payments could at any time be revoked by Mrs. T. :—

Held : the allowances to the children were not sums received from foreign possessions within the Income Tax Act, 1918, Sched. D, Case V, r. 2, but they were nevertheless to be included in Mrs. T.'s assessment for income tax purposes inasmuch as she was the person "entitled to the income" within the Miscellaneous Rules applicable to Schedule D, r. 1, which must be read in conjunction with rule 2 above-mentioned.

[EDITORIAL NOTE. The decision in *Archer-Shee* v. *Garland* [1931] A.C. 212, is here carried one step further. In that case it was held that income under a trust situated abroad was assessable under the Finance Act, 1918, Sched. D, Case V r. 2, on the "actual sums received" in England. Here the actual receipt by the beneficiary in England is held not to be necessary, provided the beneficiary is "entitled to the income" within the Miscellaneous Rules applicable to Schedule D, r. 1. The Court, however, founded this conclusion upon their view of the legal effect of the manner in which the remittances had been effected, which they held amounted to no more than a revocable mandate. They declined to express an opinion on what the position would be in the case of an actual assignment by the beneficiary of his interest in the income before its receipt in the United Kingdom by the assignee.

As to Tax on Income arising from Foreign Possessions, see HALSBURY, Hailsham Edn., Vol. 17, pp. 195-202, paras. 400-418, and for the Cases, see DIGEST, Vol. 28, pp. 79-81 and Supp.]

Cases referred to :

(1) *Archer-Shee* v. *Garland*, [1931] A.C. 212 ; Digest Supp.
(2) *Alexander* v. *Steinhardt, Walker & Co.*, [1903] 2 K.B. 208 ; 8 Digest 452 *259.*
(3) *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454, 8 Digest 445, *205.*
(4) *Richards* v. *Delbridge* (1874), L.R. 18 Eq. 11 ; 25 Digest 537, *259.*
(5) *Drummond* v. *Collins*, [1915] A.C. 1011 ; 28 Digest 80, *441.*
(6) *Re Chrimes, Locovich* v. *Chrimes*, [1917] 1 Ch. 30 ; 27 Digest 124, *1002.*
(7) *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264 ; 8 Digest 499, *634.*
(8) *R.* v. *Income Tax Special Commissioners, Ex p. Shaftesbury Homes and Arethusa Training Ship*, [1923] 1 K.B. 393 ; 28 Digest 84, *480.*
(9) *Whelan* v. *Henning*, [1926] A.C. 293 ; 28 Digest 81, *450.*

APPEAL from a decision of SINGLETON, J., made on July 5, 1935, confirming a decision of the Special Commissioners of Income Tax that certain annual payments to persons resident in the United Kingdom made on the instructions of the late Mrs. Timpson, a resident in the United Kingdom, by the trustees of a trust fund in New York to the income from which Mrs. Timpson was absolutely entitled were income "received in the United Kingdom" by Mrs. Timpson and properly taxable under the Finance Act, 1918, Sched. D, Case V, r. 2.

The facts and arguments are set out in the judgment of LORD WRIGHT, M.R.

Kenelm Preedy and *J. S. Scrimgeour*, for the appellants.

Sir Donald Somervell, K.C., S.-G., and *Reginald P. Hills*, for the respondent.

LORD WRIGHT, M.R.: This is an appeal from a judgment of SINGLETON, J., who confirmed the decision of the Special Commissioners of Income Tax; it raises a question of some importance and nicety under rule 2 of the Rules applicable to Case V of Schedule D of the Income Tax Act, 1918, as read with rule 1 of the Miscellaneous Rules applicable to Schedule D. The question is under what circumstances income from a foreign possession is chargeable to tax having been received in the United Kingdom.

The appellants are the executors of the late Mrs. Timpson, who was beneficially entitled to a life interest in a certain proportion of the net income of a trust fund created under her grandfather's will: the trust fund was in New York State, and the trusts of the will fall to be administered under the law of that State: that law is found in these terms in the special case:

> Under that law the whole estate in law and in equity in the trust funds is vested in the Trust Company, and the trust gives to the beneficiary merely the right to resort to a Court of Equity to compel the Trust Company to discharge the task imposed upon it, which was to apply the net income of Mrs. Timpson's share of the residue to her during her life.

The Special Commissioners applied to that finding the decision of the House of Lords in *Archer-Shee* v. *Garland* (1), which held that, in the case of such a trust fund, assessment could not be made under rule 1, but could only be made under rule 2, which is in the following terms:

> The tax in respect of income arising from possessions out of the United Kingdom, other than stocks, shares or rents, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom, on an average of the three preceding years as directed in Case I., without any deduction or abatement other than is therein allowed.

The three years average in rule 2 as it originally stood was changed by the Finance Act, 1926, s. 29, and one year was substituted. The decision in *Garland's* case (1) did not, however, throw any light on the main question at issue in this case, namely, on what sums in such a case the tax is to be computed.

It is necessary first to summarise the facts. The terms of the will itself need not be quoted beyond stating that the trust in favour of Mrs. Timpson was to apply the net amount of the income of the specified fund after deducting lawful charges and commissions quarterly or as often as the same should from time to time accrue, to the use of Mrs. Timpson during her life. The trust, as the law of New York State has been, as above stated, found by the Special Commissioners, was not a discretionary trust: accordingly as and when the net income accrued due, she was entitled to have that net income applied to her use: though she had no right in any of the specific property constituting the trust fund, the net income was subject to her disposition; the words "to the use" must in the absence of evidence of the New York law on this point, be construed as having the same meaning as in English law, she had the sole beneficial interest, and accordingly the trustees were bound to obey her instructions. The net income as and when it accrued and was ascertained was thus her income.

Mrs. Timpson, who was at all material times resident in England, in exercise of these powers instructed the trustees to make certain payments by way of allowances to her three children who were in the United Kingdom. The trustees were up to September, 1922, the New York Life Insurance & Trust Company. In September, 1922, they became merged by amalgamation in the Bank of New York & Trust Company, who thereby became and continued the trustees. The business of the latter company included a banking department, so that they were able to make remittances to the United Kingdom by drawing upon their London correspondents.

The first instructions given by Mrs. Timpson to the trustees were dated February, 1921, and were in the following terms:

> New York Life Insurance and Trust Company, 52, Wall Street, New York City. Dear Sirs, I hereby request and direct that out of the income derived from the estate held by the New York Life Insurance and Trust Company in trust for my benefit under the will of John W. Hammersley deceased, the following sums be paid to the respective parties:—£200 per annum to Theodore L. Timpson, £130 per annum to Robert Timpson, £130 per annum to Katherine Timpson, my daughter, in quarterly payments, the first payment to be made on March 25, 1921, and I hereby agree that all amounts so paid shall be good and proper charges against the aforesaid income as though said amounts had been paid to me upon my receipt. And I request and direct that the foregoing payments shall continue to be made until otherwise directed by me in writing. Very truly yours, Katherine L. Timpson.

Subsequent instructions to the same effect but for increased amounts were given to the Bank of New York & Trust Company on May 12, 1923, and again on Feb. 27, 1925, and on May 18, 1926.

Before September, 1922, the new trustees carried out these instructions by obtaining from the Agents Bank of Montreal in New York a sight draft in sterling drawn on the Bank of Montreal in London for the appropriate amount payable to the child in question. A letter was then posted either to the child or the child's bankers in England, enclosing the draft. After the merger in 1922, the new trustees from time to time drew sight drafts in sterling for the appropriate amounts, on their London correspondents, payable to the respective children; these they posted in due course in New York, to the child or the child's bankers as before. On each occasion when they did so, the trustees debited Mrs. Timpson's account with the proper sum in dollars. There is no evidence of any intimation being made direct by Mrs. Timpson to her children in respect of any of the drafts. It is not stated but must be assumed that the letters enclosing the drafts severally reached their addresses and that the drafts were cashed in ordinary course.

The amount of the remittances which fell within the period from March, 1922, to September, 1926, were included in the assessments made on Mrs. Timpson for the years 1924/25, 1925/26 inclusive. The question is whether they were rightly so included. On this the Commissioners held "that the allowances to Mrs. Timpson's children remained her income, and as they were remitted to the United Kingdom were assessable to income tax upon her." This holding has been affirmed by SINGLETON, J.

It is convenient in the first place to analyse the legal effect of these transactions. Each remittance was a voluntary allowance or gift with the consequence that the donee only acquired the remittance when the gift was perfected. No distinction was drawn by the appellants, indeed any distinction was expressly disclaimed between the drafts before the merger and the drafts after the merger. I accordingly discuss only the latter, in which the trustees were drawers. It is clear that at any time before the drafts were cashed the trustees could countermand payment, and hence there was no completed gift until payment, just as much as in the case of a cheque there is no completed gift at least *inter vivos* of the money until the cheque is cashed.

No doubt when the draft reached the child, there was a completed gift of the piece of paper, but that paper had only a nominal value unless and until the money was collected by, or credited to, the child. Hence, until that was done, the money represented by the cheque remained the income of Mrs. Timpson, that is, income to which she was beneficially entitled under the trust and as such arrived in England and was received by the child or his or her agent. It was, however,

disputed by the appellants that this was true in the facts of this case, and the objections were put on two grounds. First, it was said that the property passed to the child when the letter containing the draft was posted in New York: reliance was placed, in support of this contention, on a decision of Bigham, J., in *Alexander* v. *Steinhardt, Walker & Company* (2). I should desire, if it were necessary, to have an opportunity of reconsidering that decision, but if it is rightly decided on its facts, I do not think it would cover a case like those in question of voluntary gifts where the sending of the remittance is the spontaneous act of the sender and no communication, so far as is known, reaches the donee until the letter actually comes to the child. A case like the present is obviously different from one in which there is the acceptance by post of an offer, carrying with it an authority to accept by the act of posting a letter; it is quite impossible in the present case to say that the Post Office was the agent of the addressee: that can never be so (if it is ever true) where, as here, there was no authority from the addressee to the sender to post the remittance, where indeed the posting was voluntary, gratuitous and unannounced. Hence, in my opinion, property even in the draft as a piece of paper did not pass to the child till it was received in England.

But it was further said that what was done in New York constituted an assignment of each remittance, so that the property in the remittance passed in America and the money was never received as Mrs. Timpson's money in England. It was also said that a trust was created by the same facts with the same consequence. I cannot accept either view. On the first point whether there was an assignment created by drawing and posting of the draft, it is perhaps enough to say that there was no communication to the assignee until the draft arrived in England; communication from assignor to assignee either directly or indirectly is a necessary condition of an assignment, and here there was nothing of that sort, either mediately or immediately. But I do not put my conclusion merely on that ground. Lord Macnaghten said in classic language in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (3):

> 'But," says the Lord Chief Justice, "the document does not, on the face of it, purport to be an assignment nor use the language of an assignment." An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor.

Here, in my opinion, there is no evidence of intention to assign at all. What happened was that Mrs. Timpson being minded to make

the remittance in each case, so instructed the trustees who carried out those instructions, as they were bound under the trust to do, and did so in the ordinary course of business by drawing a draft and sending it to the recipient. I cannot see how it can properly be said in a simple case like this that instructions to draw and remit a cheque constitute an assignment of money. All that happened was that a mandate to remit was given by Mrs. Timpson to her trustees who were bankers, who proceeded to carry it out in accordance with usual banking practice. The trustees were in equity bound to obey that mandate, but the remittance was gratuitous and the mandate could have been withdrawn if Mrs. Timpson so directed her trustees, who would have been bound to cancel the authority to pay contained in the draft if the withdrawal was notified in due time, so that notice countermanding payment could be given to the drawees before they accepted or paid. In that event the relative amount would be re-credited to Mrs. Timpson in the trust accounts less any expenses properly incurred by the trustees. I think the argument that there was an assignment of the remittance in New York, and that, therefore, the money was never received in England as Mrs. Timpson's money, fails. Equally I am of opinion that the idea of a trust of the remittance is foreign to the nature of a commonplace banking transaction performed in the usual way to remit funds from one country to another and to a payee in the latter. To constitute a trust *pro tanto* of Mrs. Timpson's equitable interest in her income, there must have been evidence of intention by her to create such a trust (see *Richards* v. *Delbridge* (4)). I can find no evidence of any such intention or expression of it.

The learned Judge held on this view of the facts that the money was received in England by Mrs. Timpson and accordingly was taxable under the above-mentioned rule. With all respect, I do not feel able to concur in that view. I do not think that it was received by her within the meaning of the rule. So far as she was concerned, she did not intend to receive it in England or to control it in England in any way. If payment was to be countermanded before the gift was complete, that could not be done by her but by the trustees, though no doubt in doing so they would be acting on her request. If that had happened, the remittance as such would not have been available to her in England. The debit in the trustees' books in New York would have been cancelled, and the relevant amount less expenses, if any, would have been restored to the trust account in New York for her beneficial interests. If the child had got the money, Mrs. Timpson would have had no control over it. She would never have had any beneficial property in it in England ; it would not even have been credited to her in the same sense as a remittance would be if it had been sent to a tailor or a grocer to discharge a debt or to acquire a thing of value. I do not, therefore, think that

these payments were actual sums from her income which were received by her in the United Kingdom. Indeed the whole purpose of the transaction was that the remittance should not be received by her, but received by the child as donee. It had been assumed that rule 2 related to actual sums received in the United Kingdom by Mrs. Timpson, but Romer, L.J., during the course of the argument made an entirely new suggestion, and we have had the benefit of argument on that point by counsel on both sides. Romer, L.J., pointed out, that rule 2 of the rules applicable to Case V did not in terms say that the actual sums received in the United Kingdom must be received by the taxpayer or indeed specify by whom: he further pointed out rule 1 of the Miscellaneous Rules applicable to Schedule D must be read with rule 2 of the rules applicable to Case V, and that in rule 1 is to be found a definition of the persons on whom tax under Schedule D is to be charged; they are defined as being "the persons receiving or entitled to the income" in respect of which the tax is directed to be charged. It follows as he pointed out, that if the sums in question were received in the United Kingdom as the income of Mrs. Timpson she was chargeable to tax as being the person entitled to it when it came into the United Kingdom, though in fact she never received it herself.

I respectfully agree with this way of looking at the question. The tax under rule 2 is a tax on Mrs. Timpson's income and I am prepared to assume for this case that the tax is limited to a computation based on actual sums received as her income in the United Kingdom: on that assumption I am of opinion, if it comes here as her income, that the fact that on arrival it is applied, in accordance with her directions in payment to others, does not affect its chargeability to her. I assume that the particular part of her income must not have been alienated by assignment or trust away from her before the actual sum was remitted to the United Kingdom. But that, as already explained, is not true in this case. In fact, it came in equity and in the way I have stated as her income, however she chose to apply it; whether to payment of debts or in purchase of valuable things or of service or as a voluntary allowance, it was income of hers to which she was entitled. Actual receipt by her would, I think, be too narrow a condition of chargeability: no one would doubt that she should in fairness be charged where the income was applied in the country to the discharge of debts or the acquirement of valuable things or interests, but I find it difficult to bring such payments any more than gratuitous payments like the payments in question within the charging rule, if that rule is limited to cases where there is actual receipt in this country by the taxpayer personally. But the test that the taxpayer should be entitled to the income (provided as I here assume that it comes as her income) whether she actually receives it or not, appears to me to be in accordance both with the language and the

intent of the rules. Miscellaneous Rules, r. 1, applies to all cases under Schedule D and is aptly framed, and is, I think, effective, to charge all income of the taxpayer though the taxpayer never handles it himself, because he applies the income before it reaches him, so that he never actually receives it, though he disposes of it. What rule 2 of the rules applicable to Case V, read with rule 1 of the Miscellaneous Rules, requires is that the actual sums of the taxpayer's income should at least come to this country, under such circumstances that the taxpayer, if he does not actually receive them, is entitled to them, and these conditions were fulfilled in the present case. I reserve for further consideration in case the question should ever arise, the question whether if income accrues abroad either *qua* legal estate or *qua* equitable estate to a taxpayer resident in this country, rule 2 of the rules applicable to Case V and rule 1 of the Miscellaneous Rules, would make the taxpayer liable to charge in that event, even though the taxpayer disposed of his interest in that income before it was received in the United Kingdom so long as the actual sums of that income were in fact received by the alienee in this country.

I agree with the result arrived at by the Commissioners and the Judge though perhaps not entirely for the same reasons.

The appeal will be dismissed with costs.

ROMER, L.J.: Under Case V in clause 2 of Schedule D to the Income Tax Act, 1918, income arising from possession out of the United Kingdom is chargeable to income tax. Rule 1 of the Miscellaneous Rules applicable to that Schedule provides that such tax shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income in question. Rules 1 and 2 of the Rules applicable to Case V show how the tax is to be computed. The former of those two rules applies to income arising from stocks and shares or rents in any place out of the United Kingdom. The latter applies to income arising from all other possessions out of the United Kingdom. In view of the finding of fact in the third paragraph of the special case, the tax on income to which Mrs. Timpson was entitled in any year of assessment under the will of Mr. J. W. Hammersley falls to be computed under rule 2 in accordance with the decision of the House of Lords in *Archer-Shee* v. *Garland* (1).

Under that rule tax for each of the years of assessment ending April 5, 1925, 1926 and 1927, respectively had to be computed on the full amount of the actual sums received in the United Kingdom from amongst other things remittances payable in the United Kingdom on an average of the three years preceding the year of assessment. The rule does not require that the sum should have been received by the person entitled to the income. In computing the tax, therefore, sums paid to third parties for the benefit, or at the request of, the party so entitled have

to be taken into account ; and this is only what one would expect. For sums thus paid out of a person's income form part of his income for the purpose of the Income Tax Acts. See *Drummond* v. *Collins* (5).

The only question, therefore, that falls to be determined on this appeal is whether the sums paid to each of the children of Mrs. Timpson in pursuance of the requests made by her to the American trustees were paid out of her income, or whether they were paid out of the income of that child. Now, they were, without any question, paid out of Mrs. Timpson's income if before the payments were made the children had not become entitled in equity to demand from the trustees payment of those sums. That it was competent for Mrs. Timpson to dispose of her equitable interest in the net income from time to time in the hands of the trustees cannot be doubted. It was held by them in trust to dispose of it for her use, that is to say, in trust for her absolutely. She could, therefore, dispose of her equitable interest in whole or in part, whether with or without consideration, and whether in favour of a child or other relative or a complete stranger. Should she do so, the equitable interest of the income so disposed of would vest in the person in whose favour the disposition was made. It becomes, therefore, necessary to ascertain whether the letters which were addressed by Mrs. Timpson to her trustees, and which are set out in the appendix to the special case, operated to vest in the children respectively an equitable interest in the net income in the hands of the trustees to the extent mentioned in those letters. If they did, the remittances made by the trustees to each of the children in this country in pursuance of the letters formed part of the income of that child. If they did not, the remittances never ceased to be income of Mrs. Timpson. For she alone could dispose of her equitable interest in the income—the trustees had no power to do so—and it is not suggested that except by the letters she herself ever made any such disposition.

Now the equitable interest in property in the hands of a trustee can be disposed of by the person entitled to it in favour of a third party in any one of four different ways. The person entitled to it (i) can assign it to the third party directly, (ii) can direct the trustee to hold the property in trust for the third party : see per Sargant, J., in *Re Chrimes*, *Locovich* v. *Chrimes* (6), (iii) can contract for valuable consideration to assign the equitable interest to him, or (iv) can declare himself to be a trustee for him of such interest. In the present case the last two methods may be disregarded. For if the letters could possibly be regarded as constituting a contract between Mrs. Timpson and the children mentioned in them—and obviously they cannot—there was no consideration for such contract. Nor is it possible to maintain that Mrs. Timpson by the letters constituted herself a trustee of any part of her income for any of her children. "For a man to make himself a trustee," said Jessel, M.R., in *Richards* v. *Delbridge* (4), "there must be an expression

of intention to become a trustee." "It is true," he had said in an earlier part of his judgment, "he need not use the words 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning." In *Milroy* v. *Lord* (7), TURNER, L.J., after referring to two methods of making a voluntary settlement valid, namely, by assignment or declaration of trust, added :

> The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.

JESSEL, M.R., in *Richards* v. *Delbridge* (4), said that that sentence contained the whole law on the subject. Unless, therefore, the letters constituted an assignment to the children respectively of the equitable interest of Mrs. Timpson in the net income to the extent therein mentioned, by one of the first two methods to which I have referred, no equitable interest in the income ever passed to them.

It is true that in order to effect an assignment of an equitable interest no particular form of words is necessary so long as the intention to assign is made clear. In *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (3), LORD MACNAGHTEN, after stating that an equitable assignment does not always purport to be an assignment, or use the language of an assignment, said in relation to the equitable assignment of a debt :

> It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice he does so at his peril. If the assignment be for valuable consideration and communicated to the third person it cannot be revoked by the creditor.

But no document can effect an assignment of an equitable interest unless it results in a vesting of the interest in the assignee, so that after notice of it is given to the trustee the latter becomes a trustee of the interest for the assignee. If then the letter of Feb. 28, 1921, to take one of them as an example, constituted an assignment to Theodore L. Timpson of the sum of £200 a year out of Mrs. Timpson's income until she should otherwise direct in writing, then, unless and until she otherwise directed, Theodore L. Timpson would have had a right in equity to compel the trustees to pay him £200 a year out of the net income in their hands. In my opinion he acquired no such right. I regard the letters as no more than revocable mandates given to the trustees, and conferring no rights whatsoever upon Mrs. Timpson's children. There was no valuable consideration given by the children, nor were the letters

ever communicated to them by anybody. The mandates were, therefore, revocable at all times material to the present case. It was, indeed, suggested in argument on behalf of the appellants that the mandates became irrevocable after the trustees had incurred expense toward carrying them into effect. This is, in my opinion, an untenable proposition. Mrs. Timpson could no doubt have been called upon by the trustees to indemnify them in respect of any expense or liability incurred by them in acting upon the mandates. But the children acquired no rights by reason of the trustees having incurred expense or liability, and nothing done by the trustees could deprive Mrs. Timpson of her rights as against the children of revoking the mandates whenever she thought fit to do so. In my opinion the sums paid to Mrs. Timpson's children were paid out of her income, and not out of the income of those children.

I only desire to add this. If Mrs. Timpson, by her letters, disposed in favour of her children of any part of her equitable interest in the income, she had the power without the consent of any other person by virtue of those dispositions to obtain for herself the beneficial enjoyment of it. It would seem, therefore, that the income so disposed of must be deemed for the purpose of the enactments relating to income tax to be her income, by reason of the provisions of the Finance Act, 1922, s. 18. For these reasons I am of opinion that this appeal fails, and must be dismissed with costs.

Greene, L.J.: Rule 2 of the Rules applicable to Case V of Schedule D to the Income Tax, 1918, provides that "The tax in respect of income arising from possessions out of the United Kingdom other than stocks, shares or rents shall be computed on the full amount of the actual sums annually received in the United Kingdom"—from the sources mentioned—"on an average of the three preceding years as directed by Case I." By the Finance Act, 1926, s. 29, the income of the year preceding the year of assessment is substituted for the three years' average.

Under those provisions the subject matter of taxation is not the amount received in the United Kingdom, but the "income arising from possessions out of the United Kingdom other than stocks, shares or rents." The expression "shall be computed on" is that regularly used in the Act to introduce a conventional method of computation of the income which is the subject matter of the tax—see, for example, the rule applicable to Case I of Schedule D, and Case III, r. 2, and compare *R.* v. *Income Tax Special Commissioners, Ex p. Shaftesbury Homes and Arethusa Training Ship* (8), *Whelan* v. *Henning* (9).

Under rule 1 of the Miscellaneous Rules applicable to Schedule D, the tax is to be "charged on and paid by the persons or bodies of persons receiving or entitled to the income in respect of which tax under this

Schedule is hereinbefore directed to be charged." In its application to cases falling under Case V, r. 2, this rule will run as follows: "Tax shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income arising from the possessions out of the United Kingdom," that income being "the income in respect of which tax . . . is hereinbefore directed to be charged" referred to in Miscellaneous Rule 1.

The joint effect of the two rules, therefore, is that a person "entitled" to income arising from possessions out of the United Kingdom is liable to be charged with and to pay tax "in respect of" that income, and for the purpose of computing the amount of the income a conventional figure is taken based on a three years' average of the sums actually received in the United Kingdom, or the sums so received in the year preceding the year of assessment as the case may be.

In the present case the "foreign possession" consisted of the right which Mrs. Timpson had under the law of the State of New York "to resort to a Court of Equity to compel the Trust Company to discharge the task imposed upon it, which was to apply the net income of Mrs. Timpson's share of the residue to her use during her life"—I quote from para. 3 of the case. It was by virtue of this possession that Mrs. Timpson was entitled to receive from the Trust Company the net income as received and ascertained by them. Any sum which the Trust Company at any moment became bound to pay over to Mrs. Timpson became, in my judgment, *ipso facto* income to which she was entitled, and any disposition of that income made by her, or upon her instructions, was a mere disposition of her income.

I need not refer in detail to the instructions given by Mrs. Timpson which give rise to the present questions. The effect of those instructions falls to be determined in accordance with the law of the State of New York, but in the absence of any finding by the Commissioners, that law must be treated as being the same as English law. I cannot read these instructions as amounting to an assignment, or as a declaration of trust. They are in terms merely revocable mandates, and in sending the remittances to the children the Trust Company was, in my judgment doing no more than complying with Mrs. Timpson's directions as to the application of income to which she was entitled. Further, by the terms of the documents themselves it was only on payment of the amounts to the children that the Trust Company was to be discharged from its obligation to pay them to Mrs. Timpson herself, and accordingly, unless and until payment was made, the sums in question remained income of Mrs. Timpson.

If this view be correct, the fact that the actual hands to receive in this country the money derived from the remittances were those of the children appears to me to be irrelevant since provided the income

in respect of which the assessment is made is income to which the person assessed is entitled, it is, in my judgment, immaterial whether the sum "received in the United Kingdom" is received by him or by some third party upon his instructions.

For these reasons, which are not quite the same as those upon which the learned Judge based his judgment, I am of opinion that the appeal should be dismissed.

What the position would be in the case of an actual assignment (or declaration of trust) of moneys in the hands of foreign trustees, and ready for distribution, and a subsequent remittance of those moneys to the assignee (or *cestui que* trust under the declaration of trust) in the United Kingdom is not a question which arises in the present case, and I express no opinion upon it.

Appeal dismissed.

Solicitors: *Waterhouse & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

GREEN *v.* BERLINER AND OTHERS.

[KING'S BENCH DIVISION (du Parcq., J.), **February 5, 6, 1936.**]

Theatres and entertainments—Sunday entertainment—Boxing—No free admission—Keeper—Master of ceremonies—Advertisement—Sunday Observance Act, 1780 (*c.* 49) *ss.* 1, 2, 3.

(i) B. was the general manager of the Ring, Blackfriars, of which the proprietors were a limited company. A boxing performance to which there was no free admission took place at the Ring on Sunday, May 5, 1935. B. knew of all the arrangements made in connection with the performance and his name appeared as general manager on all advertisements of that performance. A letter dealing with a charitable collection, which was made during that performance, contained in its heading: "General Manager; B.", and was signed with his name. B. was not at the performance complained of:—

HELD: B. had not ceased by reason of his absence to be manager and in control of the performance, and was the "keeper" within Sunday Observance Act, 1780, ss. 1 and 2.

(ii) H. was alleged to have announced the fights, introduced the boxers, announced the results and to have conducted the collection. H. was not identified as the person who had performed these duties, but he did not give evidence to deny the charge:—

HELD: H. was master of the ceremonies within sect. 1 of the above Act.

(iii) A handbill bearing the imprint of S.P. Ltd., dated May 5, 1935, and giving details of the performance and of the price of seats was handed to a person awaiting admission:—

HELD: the imprint was not in itself sufficient evidence that S.P. Ltd. had printed the handbill.

(iv) F.P. Ltd. in their paper "Boxing" announced one of the contests which was to take place at the performance in question. No price of the seats was mentioned and no payment was received for the announcement:—

HELD: the announcement was an advertisement within sect. 3 of the above Act.

(v) The plaintiff in one action sued the four parties above-mentioned for penalties under the Sunday Observance Act, 1780. It was contended that the four defendants were being sued for four different debts, and that such a joinder was not permitted under R.S.C., Ord. XVI, rr. 3, 4 and 6:—

HELD: exercising the discretion of the Court, no inconvenience was shown and the joinder should be allowed.

[**EDITORIAL NOTE.** This case carries the question of the law relating to Sunday entertainments some stages further than in the recent case of *Kitchener* v. *Evening Standard Co., Ltd.* [1936] 1 All E.R. 48. It is now decided that the general manager of a limited company who has dealt with all the arrangements in connection with an entertainment may be liable as being the "keeper", even if he is not present at the actual performance. The person commonly called "master of ceremonies" comes within the meaning of the same words in sect. 1 of the Act. Several minor points of procedure in actions for penalties are dealt with and also a point of more general application, i.e., that an imprint attached to printed matter is not conclusive evidence that the person there named printed it.

AS TO THE SUNDAY OBSERVANCE ACT, 1780, see HALSBURY, Vol. 27, pp. 423, 424, and FOR THE ACT IN FULL, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 4, p. 379. For CASES see DIGEST, Vol. 15, pp. 759, 760.]

Cases referred to :

(1) *Thomas* v. *Moore* [1918] 1 K.B. 555 ; Digest Practice 400, *1018.*
(2) *Payne* v. *British Time Recorder Co., Ltd., & Curtis, Ltd.* [1921] 2 K.B. 1 ; Digest Practice 408, *1084*
(3) *Tarling* v. *Rome* (1936) "The Times," Jan. 17, 1936.
(4) *Alexander* v. *Rayson* (1935) 52 T.L.R. 131 ; Digest Supp.
(5) *Reid* v. *Wilson and Ward* [1895] 1 Q.B. 315 ; 15 Digest 759, *8177.*
(6) *Forbes* v. *Samuel* [1913] 3 K.B. 706 ; Digest Pleading 129, *1176.*
(7) *Gage* v. *Brealey* (1898) 46 W. R. 415 ; 37 Digest 550, *116.*

Action by a common informer, for £400 penalties under the Sunday Observance Act, 1780, in respect of a boxing performance on Sunday, May 5, 1935, held at the Ring, Blackfriars Road, London. The plaintiff claimed £200 against Victor Berliner as being the person "deemed and and taken to be the keeper" of the Ring within sects. 2 of the Act ; and £100 against John Thomas Haygate who it was alleged acted as master of the ceremonies within the same section ; £50 against the Salisbury Press, Ltd., for advertising the performance by means of posters and handbills contrary to sect. 3 of the Act ; and £50 under the same section against the Fleetway Press (1930), Ltd., for advertising the performance in an issue of "Boxing," dated May 1, 1935, of which journal they were the printer and publishers.

The proprietors of the Ring are the Blackfriars Athletic Syndicate, Ltd., and Berliner is the general manager. On April 15, 1935, Berliner as "general manager" wrote a letter to the Town Clerk of Southwark in connection with a charitable collection which was to be made at a performance at the Ring. The letter heading bore the words "The Ring—Proprietors, Blackfriars Athletic Syndicate Ltd.—General Manager, Victor Berliner, to whom all communications shall be addressed." The collection referred to took place on Sunday, May 5, 1935. On that day one Stone went to the Ring. Whilst waiting for admission he was given a handbill, bearing the imprint of the Salisbury Press, Ltd., and headed "The Ring, Blackfriars : General Manager, Victor Berliner." It contained the date, May 5, 1935, the names of the boxers appearing, and the prices for reserved and unreserved seats. Mr. Stone bought a ticket for 1*s.* 10*d.*, but had to stand as all the seats were occupied. Later in the day he obtained a postcard advertisement of the Sunday programmes, and bought a copy of "Boxing," dated May 1, 1935, which contained the announcement "Harry Mizler and Robert Disch at the Ring, Sunday." No payment was received by the Fleetway Press, Ltd., for this announcement.

At the performance in question, a man alleged to be the defendant Haygate introduced the boxers to the audience, announced the results, conducted the collection mentioned above and announced the programme for the following Sunday. During Mr. Stone's evidence two men stood up in Court but he was unable to identify Haygate, as such announcer.

The plaintiff appeared in person.

Martin O'Connor and *D. W. O'Connor* for the defendants Berliner and Haygate.

Cyril Salmon for the defendants, the Salisbury Press, Ltd., and the Fleetway Press (1930), Ltd.

Martin O'Connor : There is no case against Mr. Haygate. He did nothing at the Ring. There is no evidence of identification against Haygate.

du Parcq, J. : Unless I am assured that you are calling no evidence, I cannot hear your submission. I am bound by the ruling of the Court of Appeal in *Alexander* v. *Rayson* (4).

O'Connor : I am calling no evidence on behalf of Mr. Haygate. There is no evidence that he was "managing or conducting such an entertainment" (Sunday Observance Act, 1780, s. 1). Merely to be master of the ceremonies is not to manage or conduct. But there is no evidence that he was acting as master of the ceremonies. A master of ceremonies is something different from a gentleman who announces the winner at the Ring. (*Reid* v. *Wilson and Ward* (5), per Mathew, J., at p. 318) [He also referred to the definition of "master of ceremonies" in the Standard Dictionary.]

As to Mr. Berliner :. it must be proved that on the day in question he acted as manager of this entertainment, and that is not pleaded. If I admit that Berliner is general manager of the Ring, this does not make him liable for any illegal performance unless it be proved that he managed or conducted the business on the day in question. Berliner was not at the Ring on the day in question and was not in any way connected with that performance. The Sunday Observance Act, 1780, s. 1, is intended to strike at the persons managing or conducting the entertainment on the day the entertainment is presented. The law allows the master of ceremonies to be prosecuted, but not the matchmaker, the boxers, the referee, the seconds or the persons who show people to their seats. The test is, who is managing and conducting the entertainment at the time of the illegality ?

du Parcq, J. : This might be an unfortunate view, for the proprietors could just set the ball rolling and escape liability.

O'Connor : The person present and controlling is the man, who is committing the offence. The plaintiff has sued in one action four different defendants for four different debts, a form of joinder not permitted under R.S.C., Ord. XVI, rr. 3, 4, and 6 (*Forbes* v. *Samuel* (6), and *Payne* v. *British Time Recorder Co.* (2). The action is misconceived.

Cyril Salmon : As to the Salisbury Press, Ltd. There is no satisfactory evidence, that the Salisbury Press, Ltd., printed or published either of the documents put before the Court. One document does not bear the name of the Salisbury Press. The other document bears the

imprint "Salisbury Press, Ltd.," and this is not sufficient (*Tarling* v. *Rome* (3)). There is nothing on the face of the document to show that this entertainment was not free. The plaintiff merely produces an advertisement that the seats are priced at so much. As to the Fleetway Press (1930), Ltd.: The term "advertisement" cannot be used for the purpose of this statute in the wide sense suggested by the plaintiff, viz., to inform (*Gage* v. *Brealey* (7)). An advertisement within the Sunday Observance Act, 1780, must be something more than a piece of news. It must have the time and the place identified, and probably the price of the seats. For the plaintiff to succeed he must show that it refers to May 5, 1935.

du Parcq., J.: This is an action brought by Mr. Green suing as a common informer. He claims that the defendants are indebted to him for sums forfeited by the Sunday Observance Act, 1780.

I might at once deal with a point that was taken by Mr. O'Connor as to the joinder of parties. Mr. Salmon did not take the point and I do not think that there is any substance in it. Mr. O'Connor said that the plaintiff was not entitled to join these four defendants asking for different relief against each of them. The rule in the Supreme Court dealing with the matter of joinder of parties has been the subject of a great many decisions in comparatively recent times. A change was made in the Rules, and the tendency of the Courts has been to give a very liberal interpretation to the rule as it exists at present; and when one looks at such cases as *Thomas* v. *Moore* (1) and *Payne* v. *British Time Recorder Co., Ltd., and Curtis, Ltd.* (2), it is, I think, plain that the plaintiff may bring any number of defendants when he is claiming relief against them, either jointly or in the alternative or severally, and "severally" means his claims against them are separate claims.

If somebody sought to join defendants in an action when his claims against them were wholly unconnected, the Court would certainly take steps to stop him from proceeding. But in this case, taking the view as I do, that it is a matter of discretion whether I say that this joinder shall be permitted or not, I am quite clear that there is no inconvenience in it, that the defendants have not suffered from it, and in short that there is no substance in it.

One other matter of a technical kind I may deal with now. It was said by Mr O'Connor, dealing with the case against Berliner, that the claim was not properly pleaded. But I am of the opinion that sect. 4 of the Act of 1780 is still effective to enable the plaintiff to sue in the form in which he has elected to sue, viz., "that the defendant is indebted to the plaintiff in the sum of £200, being forfeited," etc.

There are two legitimate ways of getting rid of common informers altogether, if anyone objects to them. One is to observe the law so carefully that there will be nothing for common informers to inform

about. The other is, if the law is regarded as objectionable, to take proper steps to get the law altered. I should not be doing my duty if I felt any prejudice against common informers.

Mr. Green was desirous to prove that the form of entertainment, which he says was an infringement of the Act, was not one that the law should be allowed to encourage. I ought not to express any opinion, and I have not to decide whether the entertainments that take place at the Ring are any better or worse whether they take place on a weekday or Sunday. He apologises for bringing proceedings under an old Act. It is immaterial when the Act was enacted. So long as it remains in force it is the duty of the Court to see that it is observed. The worst possible way of seeking to be rid of an Act of Parliament is to act as if it were not there.

The case against Berliner is this : it is said that he is, by reason of this conduct, to be deemed and taken to be the "keeper" of a placed used for public entertainment or amusement on the Lord's Day—the Ring, Blackfriars Road, where it appears that throughout the week and once at least on Sunday, May 5, 1935, boxing competitions have been held. It was proved that on May 5 there was a number of boxing competitions held at the Ring, and that money was taken at the doors, but there is no evidence that anyone got in without paying ; and the inference I draw from the evidence is that no one had got in without paying, subject to such exceptions as are made at most places of entertainment in the case of certain guests and press representatives.

The Act provides that any place open on the Lord's Day for the purposes I have referred to already and to which persons shall be admitted on payment shall be deemed a disorderly house, and the "keeper" shall be liable.

The evidence is that Berliner on April 15, 1935, wrote a letter to the Town Clerk of Southwark in which he signed himself "For and on behalf of the Blackfriars Athletic Syndicate, Ltd.—Victor Berliner, General Manager." That note paper has a heading "The Ring—proprietors, Blackfriars Athletic Syndicate, Ltd.—General Manager, Victor Berliner, to whom all communications shall be addressed."

Berliner in evidence said that that letter referred to a collection which was to be taken for the unemployed in the borough, and that he arranged for that collection. He said there was no other collection near April or May, 1935, except the one he arranged. I am satisfied that on May 5, when Mr. Stone was present and saw a number of boxing matches, a collection was taken for the unemployed, and that this was the collection arranged by Berliner.

I have had produced to me a document which was handed by some servant at the Ring on May 5 to Mr. Stone at his request. That is a handbill containing an announcement of the exhibition to take place

on that day. It has on it the words "General Manager, Victor Berliner," and immediately under "The Ring, Blackfriars Road." I infer that Berliner was not merely general manager of the company who are the proprietors of the Ring, but that he was also general manager of the Ring. I am satisfied from this evidence, and from that of Mr. Charles Frederick Donmall, who is general secretary of the British Boxing Board of Control, that Berliner is what is called a "matchmaker" at the Ring. Some weeks before this handbill was printed Berliner knew of the arrangements and knew what the handbill, when published, would contain. He knew what contests had been arranged for May 5, and I have no doubt that it is true to say that on May 5 he was not only appearing and acting as the person having management of the Ring, but that he was the person having management, not in the sense that he superintended every detail, but that he was responsible for the management. I accept his evidence that he was ill and unable to attend the Ring on May 5; but he had not ceased to act as manager and had not, in my view, ceased to be manager. He says it did not rest with him to say whether exhibitions should take place on Sundays. I am quite prepared to believe that, if Berliner had said "I refuse to allow my name to appear in any advertisements announcing contests on Sunday in breach of the law," the consequence might have been that Berliner would have ceased to be manager. But he did not say anything like this. He permitted himself to be described as general manager on all or most of the posters of that date which were exhibited outside the building, and I have no doubt that he was exercising control.

I cannot assent at all to Mr. O'Connor's argument that nobody can be dealt with unless he is on the premises when the act is committed. It is difficult to find any stronger evidence that a man is behaving as a person having management at a place than that he allows his name to appear on all advertisements as the person having management of the place.

I have come to the conclusion that the plaintiff has shown that Berliner was the "keeper" of this place within the meaning of the Act, and that the plaintiff is entitled to the prescribed penalties.

With respect to Haygate, when Mr. Stone went to this entertainment it was not his first visit and he gives evidence of Haygate that "the master of the ceremonies was Haygate, and I have seen him before officiating in the same capacity at boxing contests in the Ring." It seemed at first curious that Mr. Stone should refer to Haygate as the "master of ceremonies." In the circumstances it is plain that Mr. Stone and the plaintiff knew each other well and that Mr. Stone was well disposed to the proceedings which the plaintiff has taken, and it did cross my mind that Mr. Stone might have used the term "master of ceremonies" because it was the term employed in the Act. I thought it more applicable to the old Pump Room at Bath than to the Ring.

But it appears from Mr. Stone's evidence that in the boxing world the term is still employed. I am bound to accept that evidence because, although it is clear that there were several boxing experts in Court, none was called to contradict it. It is therefore proved that there was somebody on May 5 carrying out the duties of what is called in boxing circles the "master of the ceremonies."

It appears that the person in charge of these ceremonies was Haygate, and he is thus within the Act.

Mr. O'Connor contended that the person was not Haygate. There was no difficulty in calling Haygate to say that it was not he, but he was not called. I have no hesitation in saying that Haygate acted as master of the ceremonies, and he is therefore liable for the penalty claimed against him of £100.

With respect to the Salisbury Press, Ltd., upon the handbill handed to Mr. Stone there appears the words "Salisbury Press, London."

There is no other evidence that they printed it. Mr. Salmon says that there is not sufficient evidence on which the Court could act. It is very important that in all cases, and particularly in criminal or quasi-criminal cases, it should never be said to a man "There may not be a case against you, but nevertheless there is evidence that arouses suspicion against you and if you do not go into the witness box and give evidence, then that suspicion may develop into a certainty." This cuts at the very root of the principle that the case must be proved.

It is said by the plaintiff that it seems a strong thing to say, when you see handbills like this circulated and on them the name of the printers, that the fact that the name is there is no evidence that those people printed it.

In *Tarling* v. *Rome* (3), ATKINSON, J., said :

> Another point was that the only evidence that this advertisement had been printed by the firm of Rome was the fact that that name appeared on it. He could not see that in a quasi-criminal case the Court had any right to say that, because the name of a person appeared on a document, the Court ought to assume that that person was the person who printed it. It would be a dangerous doctrine that, merely because a man's name was on an advertisement as the printer, the Court must assume that he was in fact the printer.

Mr. Salmon very properly relied on that decision. It has been urged that this was a decision on the facts, but I have come to the conclusion that it was a decision on the law of evidence. I should like to say that, ATKINSON, J. having decided that, I need consider the point no further. But I cannot say that. I am not bound by it. I have carefully reconsidered the point, and the more I see the point the more I think that ATKINSON, J. was right. It is very tempting to say that the Salisbury Press, whose name appears on the handbill, are the printers of it. But I am bound by the rules of evidence, and I ask, what evidence

is there ? The statement " printed by the Salisbury Press " is conclusive against them *if they made it.*

I am bound to say that it has not been proved to me that the Salisbury Press, Ltd., printed this handbill. The Salisbury Press, Ltd., are entitled to judgment against the plaintiff.

With regard to the Fleetway Press (1930), Ltd., the facts are not in dispute. In the issue of " Boxing," dated May 1, 1935, there appeared on page 11 under the heading " Here and There " a number of items announcing contests to take place on future dates. I do not think it can be doubted that these items referred to the days in the week next following publication, and I cannot accept the suggestion that " Sunday " might mean some other Sunday in the dim and distant future. No payment was received for these announcements, but it is not necessary to show payment.

The main question is, are those announcements " advertisements " ? To " advertise " is to " call attention to something by a public announcement " (Murray's Dictionary). I have no doubt that each of these announcements was an advertisement of an entertainment, and that the announcement in question was an advertisement and that it referred to Sunday, May 5.

If intention is material, as it may be, I have no doubt that the intention of the proprietors or the responsible people was to advertise the entertainment. The motive was to let the readers know what was going on ; but, in order that they might know what entertainments were taking place, the editor intended to advertise the meeting at the Ring. He might not have realised that it was illegal, but he must be presumed to know the law. The Fleetway Press must pay the penalty of £50.

Solicitors : *Edmond O'Connor & Co.* (for defendants Berliner and Haygate) ; *Isadore Goldman & Son* (for defendants Salisbury Press, Ltd., and Fleetway Press (1930), Ltd.).

[*Reported by* Frank Rowe, Esq., *Barrister-at-Law.*]

APOSTAL *v.* SIMONS.

[COURT OF APPEAL (Slesser and Scott, L.JJ., and Eve, J.), **February 5, 6, 1936**]

Party wall—Damage to wall—Recovery—Law of Property Act, 1925, *Sched. I, Part V.*

The plaintiff was by virtue of the Law of Property Act, 1925, Sched. I, Part V, the owner of one half of a party wall divided vertically. He brought an action in respect of damage to the wall.

HELD: he could only recover the damage to that half of the wall which was vested in him.

[**EDITORIAL NOTE.** This case is the logical conclusion from the coming into operation of the Law of Property Act, 1925, Sched. I, Part V, which had the effect of severing the owership of party walls vertically where they had previously been held by tenants in common. It now becomes necessary in an action for damage to the wall to assess the damage done to each half of the wall if both owners claim, or to the half in the ownership of the plaintiff if only one claims. This decision will presumably only apply to cases where the party wall was before 1926 vested in tenants in common, which was not always the case.

AS TO THE OWNERSHIP OF PARTY WALLS, see HALSBURY, Hailsham Edn., Vol. 3, pp. 156-158, paras. 272, 273, and for THE CASES, see DIGEST, Vol. 7, pp. 297, 298, Nos. 215-223.]

APPEAL brought by L. Cave & Co., Ltd., who were the second defendants in the action, from a judgment of His Honour JUDGE KONSTAM in the Shoreditch County Court given on Oct. 18, 1935. The plaintiff is the freeholder of premises at 117, Hackney Road, London, and the first defendant is the freeholder and the second defendants the tenant of premises at 1A, Gorsuch Place, which are adjacent. It was claimed that the defendants had wilfully, wrongfully and/or negligently damaged a party wall between the two premises. At the hearing it was held that there was no evidence that Simons did anything to damage the wall.

J. Busse (*L. Caplan* with him) for the appellants.

F. Ashe Lincoln for the respondents.

SLESSER, L.J.: In this case a dispute has arisen between a Mr. Apostal, who is the owner of some premises, including part of a party wall, and a Mr. Simons and L. Cave & Co., Ltd., who are timber merchants and tenants of Mr. Simons, who owns the other part of the party wall. The action was brought by Mr. Apostal to recover £50 damages and a declaration that he was entitled to a certain indemnity against both Mr. Simons and L. Cave & Co., Ltd. Mr. Apostal alleged in his particulars of claim that the first-named defendant wrongfully, wilfully and/or negligently damaged a party wall and that the defendant company had damaged it in the same way by placing heavy loads of timber against it and that by reason of such acts the wall became a dangerous structure,

and the plaintiff was served with a dangerous structure notice by the London County Council. When the case was before the learned County Court Judge, he was of opinion that no sufficient cause had been shown to make out any liability at all against Mr. Simons, the freeholder. He was dismissed from the action and the appeal is not brought by him. The learned Judge, however, held that the second defendants were liable and that the damage was caused by the stacking of timber against the wall, both before and after Nov. 12, 1934. The cost of making good the damage done to the wall was £37 15*s.* 0*d.*, and £8 7*s.* 7*d.* the costs of the dangerous structure notice, making a total of £46 2*s.* 7*d.* L. Cave & Co., Ltd., now appeal against that decision. In the course of the dispute between the parties as to the use the wall was put to, the parties met together. There had apparently been an earlier dispute about the matter in 1933. Mr. Apostal, in his evidence, said that L. Cave & Co., Ltd., were in the habit of stacking timber against the wall and that he had complained to Mr. Cave about it in 1933. They came to a written agreement on Nov. 12, 1934, and it is set out in the following terms. It is signed by Mr. Apostal, the plaintiff, and it is addressed to Messrs. Cave & Co., and is dated Nov. 12, 1934. and reads :

> In consideration of Mr. L. Cave contributing the sum of £2 10*s* 0*d.*, and repairing the top of the wall at his cost and undertaking not to store timber against it and instructing his workpeople not to walk on the roof, I withdraw all claims against him.

It was said that, by that agreement, Mr. Apostal had withdrawn all claims against L. Cave & Co., Ltd., but the learned County Court Judge set aside that argument on the ground that the consideration for the agreement had wholly failed. In my opinion, it was not possible for the learned Judge to come to that opinion. Part of the consideration, namely, £2 10*s.* 0*d.*, was in fact paid. Whether the work was done or not, Mr. Apostal did not bring an action for breach of contract. Mr. Apostal withdrew all claims he might have against Mr. Cave. I understand that to mean any claim in respect of any actionable wrong done on or befcre Nov. 12, 1934, was withdrawn. He might discover some damage which had been done before that date. If so, he could not claim after that date. I do nòt think that Mr. Apostal has by that agreement precluded himself from taking action in respect of a new wrong which gives rise to a cause of action after Nov. 12. The difficulty which arises is that the learned Judge having heard the evidence—which I do not think it necessary here to discuss, for he is the Judge of fact—puts the damage to the wall as due to the stacking of timber both before and after Nov. 12, 1934. Applying what I have said to that finding, I think that if the learned Judge has come to the conclusion that the damage, though done after Nov. 12, was only the result of some wrong done before Nov. 12, it would give rise to a cause of action, the agreement

has precluded the action from being brought. But if he thinks some new wrong was done after Nov. 12, then, and only then, L. Cave & Co., Ltd., are liable for the damage. It is not clear whether the learned Judge thinks some damage was done for the first time by some wrongful act after Nov. 12. If so, he may reduce the damage to a very small amount. But the matter does not end there. The subject of party walls has been dealt with in recent legislation, and by the Law of Property Act, 1925, Sched. I, Part V, it is provided that where, immediately before the commencement of that Act, a party wall is held in undivided shares the ownership shall be deemed to be severed vertically and the owner of each part shall be given such rights of support and user as shall be requisite for conferring rights corresponding to those subsisting before the commencement of that Act. The effect of the Schedule, which is brought into operation by sect. 39, is that after the coming into operation of that Act, only one half of this wall remains the property of the plaintiff. In so far as that part which was the property of the plaintiff was injured after Nov. 12, 1934, he may recover from the person who committed the wrongful act. As regards the other half, which is the property of Mr. Simons, while Mr. Apostal has rights of support, any remedy for the interference with such rights of support must lie against Mr. Simons, who is put under an obligation by that section, and, in my view, no action can be supported against a third party such as the second defendants in this action. It follows, therefore, of the amount which the learned Judge may think fit to give, only one-half can be attributed to Mr. Apostal's section of the party wall. There remains the expenses of the dangerous structure notice charged by the London County Council. The surveyor was called in to look at the wall on Nov. 15. He did not think it necessary to take any action. When he saw the wall on Dec. 17, he examined it from the timberyard side, and he said it was badly built. The bricks were extremely loose. He said that in view of its condition, it was his duty to report it to the London County Council as a dangerous structure. If what was discovered on Dec. 17 was the result of something done before Nov. 12, I am of opinion that Mr. Apostal had withdrawn his claim. If a new claim had arisen which consisted in the notice and either in whole or in part to that notice, that expense may be attributable to L. Cave & Co., Ltd. In so far as part of the expenditure was devoted to Mr. Simons' section of the wall, the plaintiff will only be able to recover half of that expenditure. Subject to this direction, this appeal will be allowed with costs.

SCOTT, L.J.: I have very little to add, but if the case comes on again, I may say that the learned Judge has pointed out that some damage was done to the wall after Nov. 12. It is important, with respect to that question of fact, to remember that Cave undertook not to stack timber against the wall in such a way as to damage the same. On

Nov. 29, the plaintiff complained that L. Cave & Co., Ltd. had not carried out one of the obligations of the agreement. There is no allegation that they have failed with respect to the undertaking not to stack timber. L. Cave & Co., Ltd. wrote in reply that they went to a lot of trouble in clearing the wall and had kept the space unoccupied at great inconvenience to themselves. On the night of Dec. 12-13, certain operations were carried out. It was not suggested at that time that the hole in the wall was caused by the timber, but that there was some deliberate or malicious act, and the probability is that when the support to the wall given by the timber was withdrawn, the wall came to pieces by its own rottenness. With regard to the Law of Property Act, 1925, I agree with what has been said.

Eve, J.: I agree.

Slesser, L.J., added that as the appellants had so substantially won on all the essential points they ought to have the costs of the appeal and also those in the Court below. An order would be made for repayment of the £46 2*s.* 7*d.* within fourteen days, that the security for the costs of the appeal be paid out, and that the costs of the hearing in the Court below be paid back to the defendants' solicitors.

Solicitors: *Teff & Teff* (for the appellants); *A. Kramer & Co.* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

THOMAS *v.* METROPOLITAN HOUSING CORPORATION, LTD.

[Court of Appeal (Slesser and Scott, L.JJ., and Eve, J.), **February 7, 1936.**]

Rent and Mortgage Interest Restrictions Act, 1923, *s.* 2—"*Actual possession*"—*Key in landlord's letter-box.*

The tenant of a flat controlled under the Rent Acts sublet one of the rooms. She relinquished her tenancy of the flat and a sub-tenant agreed with the landlords to rent the flat immediately on the expiry of her tenancy, and signed a form of application. On the Saturday preceding the expiry of her tenancy the outgoing tenant moved out with her belongings and her key was dropped into the letter-box of the landlords' agent's office, which was closed for the week-end. The sub-tenant remained in occupation of the flat and became tenant of it, according to his agreement, on the following Monday. He fell in arrears with his rent and the landlords distrained. He then claimed that the distress was illegal because the premises had never become decontrolled, and brought an action for a declaration to this effect, for an injunction, and for return of rent over-paid. His action was dismissed, and he appealed:—

Held: the surrender of the key gave the landlord "actual possession" within the meaning of the Rent Acts, and the premises were decontrolled.

[**EDITORIAL NOTE.** It had been previously decided in the case of *Jewish Maternity Home* (*Trustees*) v. *Garfinkle* (1926) 42 T.L.R. 589, that possession of the key for a considerable time amounted to "actual possession" of the premises. In the present case the key appears to have been only a short while in the constructive possession of the agent of the landlord, whilst during the same period the new tenant was in possession of the premises, though not, as it appears, as tenant.

FOR CASES upon "ACTUAL POSSESSION," see DIGEST, Vol. 31, pp. 585, 586, Nos. 7353-7358, and see HALSBURY SUPP. to Vol. 18, para. 1074.]

Cases referred to:

(1) *Hall* v. *Rogers* (1925) 133 L.T. 44; 31 Digest 558, *7049.*

(2) *Gough* v. *Everard* (1863) 2 H. & C. 1; 7 Digest 113,*663.*

(3) *Jewish Maternity Home* (*Trustees*) v. *Garfinkle,* (1926) 42 T. L. R. 589; 31 Digest 558, *7051.*

(4) *Goudge* v. *Broughton* (1929) 1 K.B. 129; Digest Supp.

APPEAL from a judgment of His Honour JUDGE HARGREAVES, delivered in the West London County Court on Oct. 25, 1935, dismissing an action by the tenant of a dwelling-house against his landlords for damages for illegal distress, for the repayment of £7 9*s.* 6*d.* rent paid in excess of the rent to which the landlord was entitled under the Rent Acts, and a declaration that the dwelling-house was controlled by the Rent Acts and that the distress was illegal; and finding for the defendants on a counterclaim for £4 18*s.* 9*d.* rent due.

Before Saturday, Oct. 17, 1931, a Mrs. Hayley was the "statutory tenant" of a flat, consisting of four rooms and offices at 21A, Tynemouth Road, Fulham, London. She sublet one of her rooms to the plaintiff, Mr. Frank Thomas, who lived in it with his wife. Mrs. Hayley desired to end her tenancy, and Mr. Thomas, wishing to succeed her as tenant of the premises, signed an application form addressed to a Mr. White, the manager and agent of the landlords of the premises, the defendant company. On this form the rent payable was stated as 19*s.* 9*d.* per week. The rent paid by Mrs. Hayley as a statutory tenant was 14*s.* per week. The date of commencement of the plaintiff's tenancy was Monday, Oct. 19, 1931, and Mrs. Hayley's tenancy expired on this date.

On Saturday, Oct. 17, Mrs. Hayley moved her furniture out of the premises about the middle of the day and left the premises herself after having tea with Mr. Thomas and his wife. The key of the premises was left in the letter-box of the agent's office on the same day. The plaintiff, Mr. Thomas, and his wife, remained on the premises over the week-end and his tenancy duly began on midnight Sunday-Monday, Oct. 18-19.

He paid rent regularly at the rate of 19*s.* 9*d.* per week until May 15, 1935, after which he fell into arrears. On July 24 the landlords, the defendant company, levied distress, and on Aug. 1, the plaintiff's goods were removed. On Aug. 8 he brought an action in the West London County Court claiming: (1) A declaration that the premises were controlled premises, and that he was entitled to be repaid £7 9*s.* 6*d* for rent over-charged for twenty-six weeks at 5*s.* 9*d.* per week. (He

admitted that he owed £7 14*s.* rent from May 13 to July 20 at 14*s.* a week, and gave credit for 4*s.* 6*d.*); (2) A declaration that the distress was illegal, and damages; (3) An injunction to restrain the defendants from further distress; and (4) The return of the goods already removed.

An interim injunction was granted.

The defendant company pleaded in their defence that the distress was lawful because the premises were decontrolled and the plaintiff owed them £12 8*s.* 5*d.* rent, and that through the injunction they had suffered damage. They counterclaimed for £2, costs of the distress, and £4 18*s.* 9*d.* rent due.

At the action, which was heard on Oct. 25, the learned Judge dismissed the plaintiff's claim and gave judgment for the defendants for £4 18*s.* 9*d.* and costs. In his note, after setting out his findings of fact, he stated that it followed that Mrs. Hayley surrendered her tenancy by agreement on Saturday, Oct. 17, and that Mr. Thomas's (the plaintiff's) tenancy did not begin till Monday, Oct. 19. He continued:

Legal possession of the premises, therefore, was vested in the defendants between Saturday, Oct. 17, on the departure of Mrs. Hayley and the placing of the key in Mr. White's letter-box, and it appears to me that the Thomases were on the premises between Oct. 17 and Oct. 19 as the licensees of the landlords, the defendant company. Actual possession through a licensee appears to me to be all that the law requires to decontrol the premises, and I have accordingly given judgment in favour of the defendant company.

The plaintiff appealed.

It was common ground that the only point at issue was whether the premises were "controlled premises" within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Acts, 1920-1933. If the premises were controlled, then the rent payable on them was 14*s.* per week and the distress was illegal, for it was levied without the leave of the Court.

Bernard Gillis, for the plaintiff: There was no surrender by Mrs. Hayley on the Saturday so as to vest legal possession in the landlords on the Saturday and Sunday. If the appellants were licensees on the Saturday and the Sunday, they were the licensees of Mrs. Hayley and not of the defendants, for she was entitled to stay in the premises until the Monday. On the facts found by the learned Judge, even assuming that the plaintiff and his wife were licensees of the landlords during the week-end, the Judge was wrong in law in holding that there was actual possession in the landlords within the meaning of the Rent Acts.

Slesser, L.J.: This Court is unanimously of the opinion that there was evidence on which the learned Judge could find that Mrs. Hayley surrendered her tenancy into the hands of the landlord on the Saturday.

Gillis: That is not a possession which in law amounts to "actual possession" as required by the statute. (See *Hall* v. *Rogers* (1) per

BANKES, L.J.). If the mere handing over of the key gives the landlord power to decontrol the premises, the whole purpose of the section is frustrated. There must be a distinction between legal possession, which is conferred upon the landlords by the delivery of the key, and actual possession within the meaning of the statute. *Jewish Maternity Home (Trustees)* v. *Garfinkle* (3). Possession by the landlord through a licensee does not on these facts amount to actual possession. If the licensee is there, the landlord is not there; *Goudge* v. *Broughton*, (4).

Salter Nichols, for the defendant company, was not called upon.

SLESSER, L.J.: This appeal fails, and may, perhaps, be said to fail on grounds which are not, at any rate, very clearly stated by the learned County Court Judge. The respondent, however, is entitled to rely on the judgment and to maintain that any sufficient grounds entitle him to hold it; and in my opinion, on the finding of the learned County Court Judge based upon the evidence, there is sufficient reason for saying that this judgment should not be disturbed. I do not think it necessary here to examine the evidence, because the material matters are all found in the judgment of the learned Judge.

It appears that, before Oct. 17, 1931, a Mrs. Hayley was the tenant of certain premises from the Metropolitan Housing Corporation, Ltd. She was what has been called in some of the cases a "statutory tenant"; that is to say, the amount of her rent and certain incidents of the tenancy were fixed by the operation of the Rent Restrictions Acts. Now, under the Rent and Mortgage Interest Restrictions Act, 1923, s. 2, it is provided that certain dwelling-houses shall be excluded from the application of the principal Act (1920). Sect. 2 (1) says:

> Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house,

and there is a definition of "possession" in subsect. (3):

> For the purposes of this section, the expression "possession" shall be construed as meaning "actual possession," and a landlord shall not be deemed to have come into possession by reason only of a change of tenancy made with his consent.

The question in this case is whether, in the circumstances which I will repeat, this house has ceased to be controlled under the Acts by reason of the fact that the landlord has come into possession within the meaning of sect. 2 of the 1923 Act.

The facts are these. The learned Judge came to the conclusion, and says that he is satisfied, that on Saturday, Oct. 17, 1931, Mrs. Hayley moved her furniture out of the premises in question about the middle of the day, leaving only certain articles which she had sold to Mrs. Thomas,

Mrs. Hayley herself left the premises finally after having had tea with the Thomases. Then the learned Judge says : " I am satisfied also that the key of the premises was left at Mr. White's office on the Saturday for the following reasons : (*a*) Mrs. Hayley moved to another district ; (*b*) The key was not sent by post."

The evidence was to this effect ; that in fact Mr. White did not find the key at his office till the Monday, but there is ample evidence to support the finding of the learned Judge that in fact it was left on the Saturday. There is the evidence, for example, of Mr. White, that " when Mrs. Hayley left, there was an arrangement between Mrs. Hayley, Mrs. Thomas and me that a key should be returned to our office when Mrs. Hayley's van left, through the post, as our office closes at noon on Saturdays." I do not dispute the finding of the learned Judge of the fact that the key of the premises was left at Mr. White's office on the Saturday. In those circumstances the learned Judge has found that the tenancy came to an end on the Saturday. But there remains further this question : whether, in addition to Mrs. Hayley's tenancy coming to an end, it can be said that the defendants entered into possession. In my opinion the fact that the premises were at that time left without a tenant—for reasons which I shall state, coupled with the fact that the key was left with the proper person, Mr. White—did give the defendants " actual possession " within the meaning of sect. 2 (3).

In the case of *Hall* v. *Rogers* (1) SCRUTTON, L.J., dealing with this section, says :

> I think Parliament in using the phrase " actual possession " intended to reject the legal right to possess and to require actual control or apparent dominion in fact.

There are many cases, of which I will mention only one, to the effect that the giving of a key giving access to the premises may amount to actual possession ; and, when this is done with the intention to give possession, that possession will be an actual possession. In the case of *Gough* v. *Everard* (2), it was argued that a key which had been given by one man to another to give access to a wharf was a mere symbol of possession, which gave the plaintiff that formal possession which was necessary under statute. But POLLOCK, C.B., answered that the whole of the timber lying at the private wharf was sold to the plaintiff and the key gave him the actual possession of it. There are many other cases to be found in the law to the same effect, which I do not think it necessary to discuss.

In my judgment that key did give actual possession, but I have referred to the fact that, between the Saturday and the Monday, there was no tenant of these premises. On the finding of the learned Judge, Mrs. Hayley's tenancy had come to an end on the Saturday. It is equally clear that on the Monday, having duly signed an application form, the

present plaintiff, Mr. Thomas, entered into his tenancy. The learned Judge has found that between Oct. 17 and 19 the Thomases were on the premises as licensees of the landlords, the defendant company, by which I understand him to mean that they were tenants at will.

It is said by counsel for the appellants that a decision in this case that actual possession was given to the landlord by the delivery of the key on Oct. 17 will have very far-reaching effects. This argument is not an unusual one, but I would point out that the facts of this case are very peculiar. It is not a case such as is contemplated in sect. 2 (3): where there has been a change of tenancy made with the consent of the landlord, one tenancy immediately to follow the other. For two days there has been on the finding of the learned Judge, apart from the holding by licence and the possible tenancy at will, no tenancy for which rent has to be paid; and there was at the time of the delivery of the key, and thereafter until the Monday, no tenant. In those circumstances the problems which might have to be considered in a case where a key was merely passed on from one tenant to the other, possibly passing through the landlord's hands for a moment, do not arise. That is not this case. As it seems to me, this case has to be considered on the footing that, between the tenancy of Mrs. Hayley and the tenancy of the plaintiff, there was a hiatus during which, apart from this licence, there was no tenancy at all; and the later limb of subsect. (3) does not seem to apply to this case.

Now, this case is in form a case brought by Mr. Thomas for illegal distress and for the recovery of certain rent which, it is said, had these premises been controlled, would have been in excess of the rent which is permissible under the Rent Restriction Acts. But it is clear, and it is agreed, that if in fact these premises were not controlled premises at the time of the acts complained of, then the distress was lawful and the rent charged was lawfully recoverable. As I have come to the conclusion that the appeal should fail—though, as I say, for reasons perhaps other than those which form the fundamental basis of the learned Judge's judgment—these questions of illegal distress and excessive rent have not, of course, further to be considered.

I would only add this: that counsel has very properly reserved for a further argument the question which the learned Judge appears to have decided—namely, that the legal possession of the premises was vested in the defendants between Saturday Oct. 17 and Monday Oct. 19 because the plaintiff was on the premises between those dates as the licensee of the landlords, the defendant company. He says:

> Actual possession through a licensee appears to me to be all that the law requires to decontrol the premises.

I am by no means ready to accept that view. I do not specifically pronounce against it, because we have not heard argument against it, and,

in the view I have formed of this case, it is not necessary ultimately and finally to decide the matter. But I would wish to say that I am not prepared, as at present advised, to accept the view that where there is a tenant at will or a person by licence occupying and enjoying the benefits of the dwelling-house, then at the same time that that person is so in enjoyment, the landlord can be in actual possession of the same premises. As I say, I would reserve that point for further consideration, saying only for the moment that I am not prepared to accept that one of the reasons which the learned Judge appears to give for his judgment.

The appeal will therefore fail and be dismissed with costs.

Scott, L.J.: I agree. Actual possession of empty premises, or of chattels which are locked up within a building or in a package of some sort, is retained by retaining the key. Possession of the key gives actual possession. The reason why there is so little law on the point is, I think, that it is difficult to imagine that anything to the contrary could ever have been contended. That disposes of this case, because the evidence is, I think, quite clear that the key of the premises was left with the landlords by the tenant going out on Saturday, Oct. 17. That was a symbolical giving-up of possession, leaving the actual possession in the landlords until the landlords parted with possession to somebody else. For that reason it is unnecessary to consider the other point—namely, that which is contained within the learned Judge's judgment about licensees. I notice that he has not held that the Thomases were tenants at will, but merely described them as licensees. If they were mere licensees, I am not satisfied that the actual possession of the premises would be divested from the landlords, who received it symbolically when the key was put in their letter-box, and vested in the Thomases. But, be that as it may, we need not deal with that matter, because the decision we have given is sufficient to dispose of the case. I agree with my learned brother Slesser, L.J.

Eve, J.: In view of the opinions which have been expressed by my colleagues, who are much more acquainted with this branch of the law than I can be, I do not dissent from the judgments which they have given; but I shall look forward with pleasurable anticipation to the occasion when we shall have to determine what "actual possession" means in this Act. Suffice it for the present to say that, as far as I am concerned, this appeal is rightly dismissed.

Solicitors: *Reece-Jones & Co.* (for the appellants); *Schultess-Young & Co.* (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

ODHAMS PRESS, LTD. *v.* LONDON AND PROVINCIAL SPORTING NEWS AGENCY (1929) LTD.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.), **February 5, 7, 1936.**]

Copyright—Compilation—No evidence of any specific infringement—Declaratory judgment—Possible infringement by documents not yet in existence—R.S.C. Ord. XXV, r. 5.

Two gentlemen, on behalf of the plaintiffs, obtained information on racecourses as to the course of the betting on races, and thus ascertained and recorded in a book the starting prices of the horses in the races. The plaintiffs claimed copyright for these compilations, but gave no evidence of any specific infringement. They then sought a declaration under R.S.C. Ord. XXV, r. 5, that they were the owners of the copyright in such compilations :—

HELD : (i) as there was very little practical prospect of any infringement in the future of the copyrights in any existing documents, no declaration could be made in respect thereof.

(ii) no declaration could be made as to the potential copyright in future documents of the same kind or any infringement thereof.

(iii) to justify the court exercising its discretionary power to make a declaration, there must be specific documents, the character of which can be established, so that the court can determine whether or not they are subjects of literary copyright, and appropriate evidence of infringement of that copyright.

[EDITORIAL NOTE. In this case the interesting question whether these records of starting prices were the proper subject of copyright, which had been decided in the negative by EVE, J., in the court below, has been left undecided and is only incidentally and quite inconclusively touched upon in the judgment of LORD WRIGHT, M.R. In the Court of Appeal the only question decided is whether the court could properly be asked to exercise its discretion and make a declaratory judgment. As is well-known, the court is slow to exercise its discretion in regard to future or reversionary rights, and here there was the added difficulty that the documents, the copyright of which was in question, were not yet in existence. In these circumstances, the court felt quite unable to make any declaration, and in the judgment of LORD WRIGHT, M.R., will be found a statement of the conditions under which such a declaration can be made. The judgment was fully concurred in by the other members of the Court.

FOR THE LAW ON DECLARATORY JUDGMENTS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 212-217, paras. 511-514, and FOR CASES, see DIGEST, Vol. 30, pp. 142 153, Nos. 183-264. For R.S.C. Ord. XXV, r. 5, see the YEARLY SUPREME COURT PRACTICE, 1936, pp. 400-403.]

Statute referred to :

Copyright Act, 1911 (c. 46), Halsbury Complete Statutes of England, Vol. 3, p. 720.

Cases referred to :

(1) *Guaranty Trust Co. of New York* v. *Hannay & Co.* [1915] 2 K.B. 536 ; 30 Digest 147, *219.*

(2) *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (1904) 9 Com. Cas. 289 ; 30 Digest 151, *241.*

(3) *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ltd.* [1921] 2 A.C. 438 ; 30 Digest 144, *199.*

(4) *Hammerton* v. *Dysart (Earl)* [1916] 1 A.C. 57 ; 30 Digest 151, *239.*

APPEAL from a judgment of EVE. J., in which he held the records or

compilations in question were not the subject of copyright and dismissed the action. The plaintiffs appealed.

Lionel Cohen, K.C., H. D. Samuels, K.C., and *E. J. Macgillivray*, for the appellants.

Hon. S. O. Henn Collins, K.C., J. P. Eddy, and *L. R. Dunne*, for the respondents.

The facts and arguments are fully set out in the judgment.

Lord Wright, M.R.: This action presents somewhat peculiar features, and comes before this Court on an appeal from Eve, J., who has dismissed the action, and has dismissed it, as he states his ground, in this way: I read what he says, because I can easily fill out the circumstances which go to explain what was said, in a moment. He says:

> The whole thing, really, in my opinion, depends upon the question of whether or no the entries in these books constituted a series of literary works in the nature of tables or compilations, and it is upon that allegation that the plaintiffs claim the right which they say gives them the right to a declaration.

Then the learned Judge goes on to say:

> In my opinion it is impossible to say that these are literary works, in the nature of tables or compilations, made by these investigators.

Then at the end he says:

> I therefore hold that the expression "literary work" includes maps, charts, plans, tables and compilations, but does not include the documents upon which the plaintiffs rely.

So that the learned Judge there is proceeding on the assumption that he is dealing with certain specific documents, and he is saying that those particular documents are not literary works within the meaning of the Copyright Act, 1911.

Now before I deal with the pleadings, I will just very shortly and very briefly indicate what I understand that the facts in this case are, so far as we have got any facts. Of the plaintiffs, who are five in number, two, Odhams Press, Ltd., and Allied Newspapers, Ltd., are engaged in preparing at race meetings in this country what are called the starting prices, primarily the starting prices of the three or more horses which are placed, and then the starting prices of all the other horses which started. For this purpose they have in their employment two gentlemen, who attend race meetings, and who make it their business to compile the starting prices in each race. If I may summarise the matter in very broad terms, they do it in this way: each of these gentlemen goes independently and circulates in the rings, hears or discovers by looking at the books of the bookmakers what bets are being offered and accepted on each horse, notes them down in his book, and when the flag goes down he and his colleague meet, compare the figures which they

have put down in those books, and arrive at a starting price for each horse. In arriving at that starting price they very often, perhaps more often than not, choose the last bet; but even so, that is an act of selection on their part, because they do not necessarily take the last bet. Each book may show a different last bet, and they then may have to choose one rather than the other, or perhaps it is a compromise figure, or they may consider that the starting price is to be ascertained by looking at some very large and important bet, although it was not the last. In that way there is prepared a rough book, some examples of which were produced, and on each page of the book, which is headed by the name of the race, there is a list of all the horses and then a number of entries of bets which these gentlemen have collected, or which each of them has collected, because each of them has his own book. Then in a column on the right-hand side there are the starting prices, ascertained in the way which I have indicated.

Now these starting prices are first of all made available for the three Newspaper Associations who are the other three plaintiffs in the action, and who have entered into certain contracts, and who pay certain sums, in order to secure the privilege of having these starting prices communicated to them at once. The two gentlemen, or one or other of them, in the ring tell the representatives of these three associations, who at once telephone the result to the offices of these associations. They then send the starting prices out to the various newspapers, and I suppose in that way they are communicated at once to every newspaper in the country. Then the bookmakers on the racecourse are informed, after a slight delay, and then the record of the starting prices of the three winners so arrived at is put up on the board. These starting prices, according to the practice of a good many years, are accepted all over the country as the prices on which starting-price bets have to be settled, and they are therefore matters of very considerable importance to people in this class of life.

Now, trouble has arisen between the plaintiffs and the defendants. The course that the defendants adopted, and which has led to this trouble, was that their representatives on the racecourse, having ascertained in some way or another, either by overhearing what was said on the course or by reading the names on the board, which I understand is what they say was the method generally adopted—having in this way become cognizant of the names and the starting prices of the three winners, and having had those prices telephoned to them from the course, they used those prices and disseminated them among their subscribers; and it is that operation which the plaintiffs are seeking to prevent. [His Lordship then read the letters before action.]

Thereupon the writ was issued, claiming in quite general terms a declaration and damages for infringement of the plaintiffs' copyright in the said starting prices, and various defences were put in, to which I

need not refer in detail. The learned Judge, when the matter came before him, dismissed the action on the ground which I have just read, namely, that there was no copyright in the entries (as he described them) in these books. In the course of the trial, the very general form of pleading by which the matter had been initiated was restricted, in this sense, that certain books were produced and were put in. They were produced, I think, during the course of the examination of one or the other of the two gentlemen who compiled them, and the books in question were those which were prepared on the course in the way which I have explained, and which show the names of the horses, and which show the starting prices of the three winners and of the other horses.

Now, the question has been raised before this Court by the defendants —apparently it was not raised before the learned Judge—as to whether this is a proper case in which the Court should exercise its jurisdiction under R.S.C. Ord. XXV, r. 5. There was, as I have already said, in the writ and the statement of claim, a claim for damages for infringement of copyright, but no evidence in support of that allegation was given before the learned Judge, and Mr. Cohen has quite frankly and properly stated here that he cannot give any evidence of any specific infringement.

Now, when one reads the claim for a declaration, as it has been amended and limited in the notice of appeal, it is in these terms: "A declaration that the plaintiffs, Odhams Press, Ltd., and Allied Newspapers, Ltd., are joint owners of the copyright in the starting prices or betting odds at the fall of the flag as ascertained and compiled and recorded in writing by their respective representatives on the racecourse immediately after the start of any horse race in Great Britain or Ireland." The second form of declaration which was asked for has been abandoned, and the claim for an inquiry as to damages has also been abandoned, so that as the matter comes before this Court, it is limited to this declaration, which, as I have already said, is in the most general terms.

Now, the claim as it is now presented does not refer to any particular documents in which copyright is claimed. It is clear that if there is copyright in these books, it must be a copyright in each particular page of each particular book, as and when the entries are made; and it is equally clear that in respect of such books as have been produced, which relate to races which have long since been run, there is very little prospect indeed that anybody, least of all the defendants, will want to commit any infringement of the copyright (if there be copyright) in those particular works, if they are to be described as literary works.

So far, dealing with the existing documents, it would appear that on any view of the legal position, there is very little practical object to be served by making any general declaration, because it is perfectly clear that there was, and could be, no evidence that they ever were infringed in the past, and if they were ever infringed in the future the matter would

be something too improbable to be reasonably foreseen, at this stage. On the other hand, it would be quite impossible, in my opinion, for the Court to make a general declaration as to the potential copyright in future documents of the same kind which may or may not come into existence in the future.

The position, therefore, is very unlike any of the other cases which I have been familiar with, in which the court has exercised its discretion under R.S.C. Ord. XXV, r. 5. The rule is in these terms:

> No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not.

The power of the court vested in it under this rule, is a discretionary power, and in every case the court must exercise its discretion on the facts of the particular case; but that the court has power to make a declaratory order in cases where no consequential relief can be given in the action is very well established, and I may refer to the case of *Guaranty Trust Company of New York* v. *Hannay & Co.* (1), where a declaration was claimed by a New York bank that they did not, by presenting a bill of exchange for acceptance with the bill of lading attached to it, represent that the bill of lading was genuine, and that they were not bound to repay the amount of the bill when it turned out that the bill had been forged. There was some difference of opinion in the Court of Appeal. BUCKLEY, L.J., was against the propriety of making any such declaration, and on the other hand, PICKFORD and BANKES, L.JJ., thought that there was nothing in the circumstances that no consequential relief could be granted which would compel the court to refuse the declaration. He referred to a number of cases, for instance, the case of *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (2), where a declaration was given in respect of a contract between the parties, whether that contract was or was not binding. That was an important matter, upon which immediate action was required.

In a later case, in the House of Lords, *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ltd.* (3), the House of Lords affirmed the decision of the Court of Appeal, who had made a declaration in the action, in which no relief was properly claimed and in which no relief could properly be granted, that under a particular contract a mortgage debt was repayable in roubles and not in sterling. LORD DUNEDIN took the strongest view in favour of the propriety of making the declarations, the other two noble and learned Lords who took the view that there should be a declaration were rather more doubtful, and LORD SUMNER states the circumstances which led him to affirm the Court of Appeal in this way: He says at p. 451:

> There is no doubt a preliminary question, I will not say a separable one—namely,

whether the loan was a rouble loan or a sterling loan or, more precisely, whether in order to redeem the plaintiffs ought to tender roubles or sterling. This was not a mere question for the plaintiffs to decide for themselves with or without legal advice; a sufficient issue had arisen before writ between borrowers and lenders to make the question one in actual dispute between them.

But there is another limitation which has been recognised by the courts, and that is that where the matter at issue is one which could not in fact arise between the parties, the court would not make a declaration, because it would in fact, quite apart from other reasons, be useless. In the case of *Hammerton* v. *Dysart* (*Earl*) (4), which was a question relating to a ferry, the learned Judge had found that the plaintiffs could have no relief against the defendants, and therefore the Court of Appeal thought it was not proper, having regard to the character of the case, to make a declaration which might pre-judge other cases. Lord Haldane, on page 65, states his view in this way:

I will say at once that I am in agreement with the Court of Appeal on this point, and not the less so because the declaration, if made, would not only establish a right, but would impose on the owner of the franchise ferry a duty, for breach of which he would be indictable, to provide adequately for the carriage of the public. I propose, accordingly, to deal first with the question of disturbance, for if this is decided in the negative it becomes not only unnecessary but improper to express a conclusion on the question of title.

In the court below, Buckley, L.J., had stated the matter in this way:

Under R.S.C. Ord. XXV, r. 5, the court now has power to make declarations of right, whether any consequential relief is or could be claimed or not. The purpose of these last words is not I think to enable a declaration to be made in a litigation between parties in which the plaintiff could under no circumstances obtain relief against the defendant. It is addressed to cases in which no substantive relief can at present be given, not to cases in which substantive relief could never be given. A declaration can under proper circumstances be made so as to bind future rights. The case here is one in which the learned Judge has found that the plaintiffs could have no relief against the defendants at all [for a reason which I need not go into]. In such a case the Court ought not and I think cannot make a binding declaration of right in favour of the plaintiffs.

Now, applying those cases, I do not desire in any way to fix any definite bounds to the discretion of the court under R.S.C. Ord. XXV, r. 5, but in the present case, I think it is clear that as matters now stand the court can give no relief at all to the plaintiffs. The question of copyright which is before the court here can only exist in respect of specific actual works, specific actual records or compilations, and it is perfectly clear that there is no question of any infringement of these. As to any future compilations of the same character which may come into existence, it would be most improper for this court to make any general declaration as to whether they would or would not be the proper subject of copyright. In order to bring such an issue before the court, there must, I

think, be specific documents, the character of which can be established, so that the court can determine whether or not they are the subjects of literary copyright, and appropriate evidence should be given to show that there has been an infringement of that copyright. In the present case none of those circumstances are present, and I think under all the circumstances that this is not a proper case for the exercise of the discretionary power.

There are one or two other matters to which I should like very shortly to refer. I cannot help thinking that, both from the letters which I have read and in the form of the claim, there has not been that precise distinction which is proper between information which is not the subject of copyright, and documents which are the subject of copyright—I am only speaking of literary copyright—and it is not at all clear whether rights are being claimed by the plaintiffs—or were being claimed by the plaintiffs, because now, of course, the matter is more precisely stated—in respect merely of the information and not in respect of the literary copyright in the strict sense of the term.

As to the decision of the learned Judge in this case, I think I ought to say, without expressing any final view, that I should hesitate very much before I arrived at the conclusion that these particular entries or books which have been put before the court are not capable of being the subject of literary copyright. They appear to be—and I state no more than a *prima facie* impression—compilations, and not merely compilations of facts, but compilations in which a selection is made, and in which figures are arrived at in certain cases which are not based on actual facts, but are matters of judgment and estimate; and, particularly having regard to the various definitions and the various cases which have been decided in respect of compilations, I should have felt at least a strong predisposition to the view that these particular books or pages of entries were the subject of literary copyright. But I desire not to deal with that matter, as it is not necessary, and indeed has not been fully argued. Nor do I desire to deal with the question whether the particular gentlemen who compiled these books were doing so, so as to vest the copyright in the plaintiffs under the terms of the Copyright Act, 1911, s. 5. All that I decide at this moment is that the case is not one in which the court can properly, or ought properly, to exercise its discretion to make a declaratory judgment under R.S.C. Ord. XXV, r. 5; and that being so, the appeal must be dismissed with costs.

ROMER, L.J.: I entirely agree with what has fallen from the Master of the Rolls, and have nothing to add.

GREENE, L.J.: I agree.

Solicitors; *Nicholson & Crouch* (for the appellants); *N. A. Woodiwiss* (for the respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

SWAIN *v.* WEST (BUTCHERS), LIMITED.

[King's Bench Division (Finlay, J., and a special jury), **February 10, 1936.**]

Master and servant—Fraud—Dismissal—Agreement to give information concerning fraud of fellow-employee—Consideration—Estoppel—Duty of employee to disclose fraud of fellow-employee.

The plaintiff, an employee of the defendant company under an agreement for a term of 5 years was dismissed during that term, the defendants alleging certain fraudulent and dishonest acts. The plaintiff did not deny these acts but in an action for breach of contract and wrongful dismissal, he alleged that under the terms of a verbal agreement between the plaintiff and the chairman of the defendant company it was not open to the defendants to rely upon certain information given by the plaintiff concerning those fraudulent acts. The plaintiff alleged that by that verbal agreement in return for information which would establish dishonesty on the part of another servant of the company, the chairman had undertaken not to dismiss the plaintiff for complicity in the frauds :—

Held : (i) it was lawful for the chairman to ask the plaintiff about the frauds ; (ii) the plaintiff was bound as part of his contract of service to answer all lawful questions and in giving the information he was merely answering a lawful question ; (iii) there was, therefore, no consideration for the alleged verbal agreement and the defendant company were not prevented from relying upon the information received.

[**EDITORIAL NOTE.** An employer is undoubtedly entitled to ask of an employee questions concerning the conduct of his business and it is part of the employee's contract of service to give, when asked, all the information he possesses in that connection. In this case the question of what the employee's duty would have been had the employer made no inquiry did not arise. It will have to be decided in some future case whether the principle in *Bell* v. *Lever Brothers*, Ltd. [1932] A.C. 161, that an employee is not obliged to disclose his own fraud, can be extended and applied to the frauds of a fellow-employee or whether it is the duty of an employee to volunteer information regarding such frauds.

It is a well-known principle in contract that the performance of something which the promisee is legally bound to perform does not amount to consideration. Therefore it being held that the employee was bound to disclose this information as part of his contract of service, the suggested verbal agreement was at once shown to be *nudum pactum*.

As to Duties and Liabilities of a Servant, see HALSBURY, 1st Edn., Vol. 20, p. 125, para. 245 ; and for the Cases, see DIGEST, Vol. 34, pp. 117-20, Nos. 881-922.]

Case referred to :

(1) *Bell* v. *Lever Brothers, Ltd.*, [1932] A.C. 161 ; Digest Supp.

Action for breach of contract and wrongful dismissal.

By an agreement in writing made on June 8, 1934, the plaintiff was employed by the defendants as their general manager, for a period of five years from June 1, 1934, and unless determined at the expiration of such period of five years by six months' previous notice in writing

from year to year. The plaintiff was to receive a fixed salary of £2,750 per annum and a commission or bonus equal to 10 per cent. of any sum in excess of £30,000 per annum of the annual trading profits less certain losses as adjusted for income tax.

On April 11, 1935, the defendants terminated the plaintiff's employment. The defendants alleged as a reason for their discharging the plaintiff that the plaintiff had contravened an Order in Council as to the marking and sale of meat. They alleged that he had marked as Empire meat what was not really meat at all, being pig's kidneys and suchlike oddments, thereby rendering them liable to prosecution. The plaintiff denied the allegation and set up in his reply an oral agreement between the chairman of the defendant company and himself to the effect that if the plaintiff would make a certain statement regarding the alleged wrongful practices of the managing director of the defendant company, the defendants would hold the plaintiff harmless and not in any way penalise him by reason of such wrongful practices. The plaintiff made a full statement accordingly.

The plaintiff contended that the defendants were estopped under the terms of this oral agreement from relying upon any of the information volunteered by him or upon any of the alleged wrongful practices of which he, the plaintiff, may have had knowledge. He further contended that in dismissing him from their employment on Apr. 11, 1935, the defendants acted in breach of the said oral agreement.

Philip Vos for the plaintiff.

Sir Patrick Hastings, K.C., and *G. D. Roberts* for the defendants.

FINLAY, J.: This action is one brought by the plaintiff, Mr. Swain, who was employed by the defendants at a very large salary, viz., £2,750 and commission, for damages and wrongful dismissal. The defendants set up that the dismissal was justified on the ground that the plaintiff had taken part in a fradulent and dishonest conspiracy to remove marks from meat and thereby to sell as Empire meat what was really not meat at all. The plaintiff, by his reply, set up another contract and another breach of contract. He did not deny that the fraud had occurred and that he was party to it, but that there was a contract between himself and the chairman of the defendant company that if he gave certain information regarding the managing director of the defendant company he would not be dismissed.

The plaintiff did make a full statement to the chairman. He contended that the defendants were estopped under the terms of that agreement from relying upon any of the information volunteered or upon the wrongful practices of which the plaintiff had knowledge. He further says that the defendants acted in breach of the said verbal agreement.

I have come to the conclusion that there is no estoppel. The real

point of substance is whether the contract as pleaded and supported in evidence discloses any consideration. Sir Patrick Hastings submitted that there was no evidence to go to the jury. The verdict of the jury was, however, taken, but they were unable to agree.

The contract set up by the plaintiff was, indeed, a remarkable one. The point which I have to decide is whether there was any evidence of a contract at all and that depends on whether there was any consideration.

The evidence stands in this way: the chairman, Mr. Greenwood, said to the plaintiff "We are trying to catch him [the managing director of the defendant company]. I want you to get me conclusive proof. If you do not, you are for it; if you do, you carry on."

Is there any consideration for that? It is submitted by Mr. Vos that there was. My attention has been called to the case of *Bell* v. *Lever Brothers, Ltd.* (1). I do not think this case decides that there is no obligation upon an employee to disclose frauds even if they are perpetrated by a fellow-employee. Here it is not a case of a person volunteering to make statements against a fellow-employee, and therefore it is not necessary for me to decide whether there is a duty upon an employee to volunteer to disclose the fraud of a fellow-employee. Mr. Greenwood was entitled to ask the plaintiff about the fraud and the plaintiff was bound to answer all lawful questions put on the matter; and this was a lawful question. There was a request for information and a voluntary supplying of information. All the authorities go to show that there was here no consideration. The employee was carrying out the contract of service and supplied this information in doing so and not under the terms of the alleged verbal agreement.

Judgment for the defendants.

Solicitors: *J. N. Nabarro* (for the plaintiff); *Wild, Collins & Crosse* (for the defendants).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

BICKERSTETH *v.* SHANU

PRIVY COUNCIL (Lord Alness, Lord Maugham, Sir Sidney Rowlatt), **January 30, 1936**].

Will—Construction—Real estate—Vested and contingent interests—"Upon my son attaining the age of twenty-five years"—"Shall take effect."

By his will a testator gave his son a legacy to be deposited in a bank "until he attains the age of 25 years" and clause 6 thereof read as follows:—"I devise unto my son . . . and his heirs . . . all that piece of land . . . together with the house buildings and premises erected thereon," and in a later clause directed that "these devises shall take effect upon my said son attaining the age of twenty-five years":

HELD: (i) the established rule for the guidance of the court in construing devises of real estate is that they are to be held to be vested unless a condition precedent to the vesting is expressed with reasonable clearness.

Duffield v. *Duffield*, (1829) 3 Bli. N.S. 260, at p. 331, and *Re Blackwell* [1926] 1 Ch. 223, at pp. 233-234 approved and applied.

(ii) on a consideration of the whole of the will and of the circumstances in which it was made, and applying the above rule, the true construction of the words "shall take effect" is that they relate to the devise taking effect *in possession*, and are not intended to impose a condition precedent on such devise. The devise must therefore be construed as vesting at the death of the testator subject to divestment if the son should fail to attain the age of 25.

Judgment of the Full Court of the Supreme Court of Nigeria (SIR DONALD KINGDON, C.J., BERKELEY and LLOYD, JJ.), upholding the judgment of WEBBER, J., affirmed.

[**EDITORIAL NOTE.** As their Lordships state in the judgment this appears to be the first time the words "shall take effect" at a certain age have been construed in a reported case in relation to a devise of real estate. There is a rule, given in these words in HALSBURY, 1st Edn., Vol. 28, p. 800, para. 1449 thus: "An estate must remain contingent until there is a person having all the qualifications that the testator requires and completely answering the description given of the object of his bounty in the will." One of the most usual forms of contingent gifts is the gift to a person "upon attaining" or "when he shall attain" a certain age. It is clear, therefore, that the construction of this devise has been governed by the consideration of giving effect to the will as a whole and no doubt considerable weight has been given to the fact that the alternative construction would have caused an intestacy as to the income of the property until the respondent attained 25. It has also to be noticed that the opening words of the devise are in the nature of an absolute gift.

FOR THE LAW AS VESTING here applied, see HALSBURY, 1st Edn., Vol. 28, pp. 797-800, paras. 1446-1448, and FOR THE CASES, see DIGEST, Vol. 44, pp. 1031-1053, Nos. 8889-9059.]

Cases referred to:

(1) *Duffield* v. *Duffield* [1829], 3 Bli. N. S. 260; *44*; Digest, 1038, *8954*.
(2) *Re Blackwell* [1926] 1 Ch. 223; 44 Digest 1047, *9016*.
(3) *Re Greenwood, Goodhart* v. *Woodhead* [1903] 1 Ch. 749; 44 Digest 1032, *8902*.

APPEAL from a judgment of the Full Court of the Supreme Cour

of Nigeria, dated Mar. 13, 1933, affirming the judgment of the Supreme Court of Nigeria, dated May 16, 1932, in favour of the respondent.

The facts and arguments are fully, in the judgment of their Lordships, delivered by Lord Maugham.

Henry Johnston for the appellant.

A. T. Topham, K.C., and *Horace Freeman* for the respondent.

Lord Maugham: This is an appeal from a judgment of the Full Court of the Supreme Court of Nigeria in an action in which the appellants were the defendants and the respondent was the plaintiff. One of the appellants is now dead and the appeal has been prosecuted by the surviving defendant. The action was brought by the respondent as devisee of certain properties for an account of the rents collected by the appellants in respect of these properties from the death of the testator until the date when the respondent attained the age of 25 years. The question for the determination of this Board is whether the devise to the respondent by the testator's will vested at the death of the testator subject to being divested if the respondent did not attain 25 or was contingent on the respondent attaining the age of 25. The Full Court, following the judgment of the learned Judge in the Supreme Court of Nigeria, has decided in favour of the former view, and it is not in dispute that if that decision was correct the order for an account of rents collected by the appellants in respect of the real properties in question must stand.

The will is dated Nov. 2, 1917. The testator desired, as appears from the instrument, to provide for his wife, a number of collateral relatives, and, in particular, for a reputed son, the respondent, and a reputed daughter, Phyllis Alaba Shanu. The two children on that date were infants. The respondent was aged 12 and did not attain the age of 25 until 1930. The testator possessed a considerable number of freehold pieces of land and houses situate in or near Lagos in the Colony of Nigeria, where he had carried on business as a trader, and he appears also to have possessed personal estate of substantial value. By his will, which is drawn up in clauses in English form, after revoking all previous wills and declaring that to be his last will, he appointed the appellants and one Foresythe (since deceased) to be his executors and trustees. By the second clause in the will he gave and bequeathed some 21 legacies, and it should be noted that a pecuniary legacy of £400 bequeathed to his daughter Phyllis was to be deposited for her in a Lagos bank, and that the rent of a house known as 65, Campbell Street, Lagos, was to be paid to her during the period of two years immediately following her marriage as pocket money. To his son, the respondent, the testator gave a legacy of £1,000 to be deposited for him in the same bank "until he attains the age of 25 years." It may be observed that this gift was beyond doubt a vested gift though the testator attempted to postpone the enjoyment of it until the respondent should attain the age of 25.

By clause 3 the testator devised certain land and houses in trust for his wife for the term of her natural life and from and after her death in trust for his son the respondent and his heirs. By clause 5 he devised another piece of land to his daughter Phyllis and her heirs and there follows the sentence "this devise shall take effect two years after the marriage of my said daughter." Clause 6 which is the clause raising the present question is in these terms :—

6. I devise unto my son Evan Adeleye Shanu and his heirs (*a*) all that piece of land situate at Oil Mill Street aforesaid together with the house, buildings, and premises erected thereon and known as "Shanuville," 5 Oil Mill Street; And also (*b*) all that piece of land situate at Campbell Street aforesaid together with the house buildings and premises erected thereon being a portion of the property known as "Shanu Terrace" 61 and 63 Campbell Street aforesaid; And also (*c*) all that piece of land situate at Massey Street in the town of Lagos aforesaid together with the house buildings and premises erected thereon and known as my business place, 39 Massey Street aforesaid; And also (*d*) all those three pieces of land situate at Massey Street aforesaid opposite to my said business place together with the house buildings and premises erected thereon and known as 22 Massey Street; And also (*e*) my piece of land situate at Ebute Metta a suburb of the town of Lagos aforesaid together with the house buildings and premises erected thereon.

These devises shall take effect upon my said son attaining the age of twenty-five years.

By clause 8 the testator disposes of the residue of his personal estate. The trustees are to stand possessed thereof upon trust to defray the cost of the maintenance and education and of the marriage of his daughter Phyllis and the cost of the maintenance and education of his son (the respondent). By clause 9 he directs that his son shall attend at a certain grammar school till he attains the highest form therein, after which his trustees are to give him a four years' course of further education and every facility to qualify in such trade or profession as his son may show an aptitude for. By clause 10 the testator directs that a cousin, Emanuel Agemo Olajonlu, shall occupy and reside in his house at 39, Massey Street, rent free until his son (the respondent) shall attain the age of 25 years, and that his trustees shall let the shop attached to the said 39, Massey Street, at such rent and subject to such covenants as they shall think fit. The house, 39, Massey Street, is one of the parcels of real estate devised to the testator's son. The will contains no gift of residue of real estate.

The testator died at Lagos on May 21, 1918. His will was proved in the Supreme Court of Nigeria on July 11, 1918. The respondent attained the age of 25 years in March, 1930, and thereupon claimed to be entitled to the rents of the properties devised to him from the testator's death. The action was tried on May 11, 1932, before WEBBER, J. The learned Judge on May 16, 1932, delivered a reserved judgment in favour of the respondent. In his reasons he stated that he had had some difficulty in coming to a conclusion, and he relied on the proposition

that in cases of doubt there is always a presumption in favour of early vesting and that it would be presumed that the testator intended the gift to be vested subject to being divested rather than to remain in suspense. From this judgment the appellants appealed. The appeal was heard in the Full Court on Mar. 13, 1933, before Sir Donald Kingdon, C.J., and Berkeley and Lloyd, JJ. The judgment of the Court was delivered by the Chief Justice who said that there was a doubt as to the intention of the testator as to the date of the vesting of the property demised. He, however, thought that the learned Judge in the Court below correctly stated that there was a presumption in favour of the early vesting in a case of doubt, and the appeal was accordingly dismissed.

Their Lordships' attention has been called to a passage in Theobald on Wills, 8th Edn., p. 642, in which the learned author states that the court (in England) does not now lean in favour of early vesting of real estate in considering the true construction of a will, and that the court now "gives effect to the intention expressed in the will without any preconception as to what the testator ought to have or has intended, subject only to this, that it may be bound by rules established by the early authorities, though it might not now adopt such rules, if the matter were at large." It seems to their Lordships to be desirable to determine in the first instance whether the passage above cited is or is not correct. It is contrary to the opinions expressed in Jarman on Wills, 7th Edn., Vol. 2, p. 1130, in Hawkins on Wills, 2nd Edn., p. 283, 3rd Edn., p. 282, and in Halsbury's Laws of England, 1st Edn., Vol. 28, p. 798. The passage generally relied upon for the principle in question is taken from the unanimous opinion of the Judges delivered by Best, C.J., in *Duffield* v. *Duffield* (1) at p. 331. In the construction of devises of real estate, he said:

> The Judges from the earliest times were always inclined to decide, that the estates devised were vested; and it has long been an established rule for the guidance of the Courts of Westminster in construing devises, that all estates are to be holden to be vested, except estates, in the devise of which a condition precedent to the vesting is so clearly expressed, that the Courts cannot treat them as vested, without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstances occasioning that doubt; and what seems to make a condition, is holden to have only the effect of postponing the right of possession.

In delivering the opinion Best, C.J., stated at p. 330 some of the reasons which had induced the Judges to adopt the rule, and it may be observed that Lord Eldon who was presiding, expressed his concurrence with the opinion of the Judges. Their Lordships have not been referred to any judgment throwing doubt upon the general validity of the rule, if it may be so described, although in subsequent statements of the court the doctrine has been laid down in somewhat less emphatic terms, and

it may well be that the present view is more accurately expressed in the language used by LORD WARRINGTON, as WARRINGTON, L.J., in *Re Blackwell* (2), at pp. 233-234. It should be observed that a similar principle has been formulated in a number of cases in connection with the very similar if not identical question whether a condition affecting an estate is to be construed as a precedent or as a subsequent condition. It has been laid down that in cases of doubt the presumption is in favour of treating the condition as subsequent. The authorities will be found referred to in *Re Greenwood* (3). On the whole their Lordships see no reason for doubting that the established rule for the guidance of the Court in construing devises of real estate is that they are to be held to be vested unless a condition precedent to the vesting is expressed with reasonable clearness.

In the present will the question may be said to depend upon the meaning of the words "shall take effect upon my son attaining the age of 25 years." The words "take effect" in this connection have not apparently been made use of in any will which has come before the courts, and their meaning is untouched by authority. In this case several considerations may help in their construction. It is not immaterial to note that the devise to the son in clause 6 begins in the form of an absolute gift and that the sentence which occasions the difficulty follows in the form of a separate clause, which if the appellant's view is correct, must be treated, though it certainly is not wholly free from ambiguity, as cutting down the prior devise. Again, the legacy to the son is to be deposited in a bank until the son attains the age of 25 years; and this may be thought to suggest that the object of the testator with regard to his son was not to prevent him having any estate in the real property unless and until he should attain the age of 25 years, but rather to postpone his enjoyment and if possible to prevent him from misapplying the property before he was 25. Further, some weight may properly be attached to the consideration that if the appellant is correct and the devise is contingent, the rents and profits of the properties in question until the son attained the age of 25 would pass as on an intestacy, with the result that neither of the children described by the testator as his son and daughter would in any circumstances derive any benefit from such rents and profits, a singular result having regard to the fact that the testator has actually directed his trustees to let the shop attached to the 39, Massey Street premises, at such rent and subject to such covenants as they shall think fit. On the other hand no weight can properly be attached to the direction that the cousin Emanuel shall occupy and reside in the house at 39, Massey Street, since this appears to be merely a personal right of occupation and not the gift of an estate. On a consideration of the whole of the will and of the circumstances in which it was made, and applying the rule or principle above referred to in relation

to vesting, their Lordships are of opinion that the true construction of the words "shall take effect" is that they relate to the devise taking effect *in possession*, and are not intended to impose a condition precedent on the devise contained in clause 6 of the will. The devise must therefore be construed as vesting at the death of the testator subject to divestment if the respondent should fail to attain the age of 25. They will accordingly humbly advise His Majesty to affirm the judgment appealed from. The appellant must pay to the respondent his costs of this appeal.

Solicitors: *Benham, Synnot & Wade* (for the appellant); *Stoneham & Sons* (for the respondent).

[*Reported by* Sam Khambatta, Esq., *Barrister-at-Law.*]

WEIGALL *v.* WESTMINSTER HOSPITAL.

[Court of Appeal (Slesser and Scott, L.JJ., and Eve, J.), **February 13, 1936.**]

Negligence—Hospital—Mat on polished floor—Duty to relative of patient.

The plaintiff, the mother of a patient occupying, for payment, a private ward in a hospital desired to consult one of its honorary surgeons, with whom she had made a personal contract for the treatment of her son. He invited her into a small room often used, to the knowledge of the hospital authorities, for such consultations between the honorary medical staff and relatives of patients. The floor was highly polished for antiseptic reasons. She trod on a mat, which slid along the floor beneath her foot, so that she fell and suffered personal injury:—

Held (Eve, J., dissenting): in these circumstances the plaintiff was an invitee of the defendant hospital, because she was in the room in pursuance of an interest common to her, the surgeon, and the hospital, and, therefore, the hospital authorities owed her the duty of taking reasonable steps to make the room safe, which duty they had not discharged. The mat was an unusual danger, of which they ought to have known, and the plaintiff was entitled to recover.

[**EDITORIAL NOTE.** In this case the mother was undoubtedly an invitee, since payment was being made for the private ward, but it does raise the question as to the area in which such a person is an invitee. It would now seem that this area includes places to which the defendants in such an action have allowed invitees to go without objection on their part, provided that it might reasonably be supposed that the invitees might need the use of such places. In this case it would seem clear that the mother might reasonably require some place in which to consult with the surgeon away from the ward. It must be noted, in considering this case, the floor had been highly polished for antiseptic reasons, and the existence of the danger must have been known to the defendants.

As to Duty to Invitees, see HALSBURY, 1st Edn., Vol. 21, pp. 385-391, paras. 654-658; and for the Cases, see DIGEST, Vol. 36, pp. 35-45, Nos. 208-281.]

Cases referred to :

(1) *Addie, R., & Sons (Collieries)* v. *Dumbreck*, [1929] A.C. 358 ; Digest Supp.
(2) *Hall* v. *Brooklands Auto-Racing Club*, [1933] 1 K.B. 205 ; Digest Supp.
(3) *Norman* v. *Great Western Railway Co.*, [1915] 1 K.B. 584 ; 38 Digest 352, *580.*
(4) *Maclenan* v. *Segar*, [1917] 2 K.B. 325 ; 36 Digest 123, *817.*
(5) *Indermaur* v. *Dames*, (1866) L.R. 1 C.P. 274 ; 36 Digest 35, *208.*
(6) *Hayward* v. *Drury Lane Theatre*, [1917] 2 K.B. 914 ; 36 Digest 38, *217.*
(7) *Coleshill* v. *Manchester Corpn.*, [1928] 1 K.B. 776 ; Digest Supp.

APPEAL from a judgment of HORRIDGE, J., given on July 18, 1935, awarding £2,826 damages and costs to the plaintiff for personal injury,

The plaintiff was being conducted by one of the honorary surgeons of the defendant hospital to the sister's office, a small room which, as a matter of convenience and to the knowledge of the defendants, the visiting surgeons used as a consulting-room when they desired to converse with patients' relatives. There she trod on a mat, which slipped from under her feet and she fell heavily. The floor was kept highly polished for antiseptic reasons, and no precautions were taken to prevent the mat slipping. She sued the hospital, a statutory corporation, for negligence. The amount of the damages had been agreed.

HORRIDGE, J., said that according to the facts the plaintiff was on the premises as a licensee for payment. There was an implied contract that she should be allowed to go to see her son at reasonable times and also be able to consult the surgeon as to her son's condition, which she would normally do in the sister's office. She was entitled to expect the hospital to use reasonable care to prevent damage from unusual danger which they knew or ought to have known (*Indermaur* v. *Dames* (5)). He found as a fact that the defendants ought to have known there was unusual danger in putting the mat on the highly polished floor with no precautions to prevent it slipping. They knew, and the plaintiff did not know, that no precautions had been taken. The case came within the language of Lord HAILSHAM in *Addie* v. *Dumbreck* (1) at p. 364 :

> The highest duty exists towards those persons who fall into the first category and who are present at the invitation of the occupier. Towards such persons the owner has the duty of taking reasonable care that the premises are safe.

He gave judgment for the plaintiff in £2,000 general and £826 special damages with costs.

The defendants appealed.

H. J. Wallington, K.C., and *Fearnley-Whittingstall*, for the appellants : There was no relation between the plaintiff and the defendant hospital with regard to the sister's office. As a result of her booking the private ward for her son, she had licence from the defendants to go from the entrance of the hospital to the private ward and back again, but no right to go anywhere else. The surgeon had licence from the defendants to use the room. After he had booked the private ward for the patient,

he was no longer the agent of the hospital; she contracted with him personally for his personal services. She had no right as against the defendant hospital to use that room. The hospital owed her no duty further than that owed to a bare licensee to protect her against unusual dangers. There was no unusual danger, as everyone knows that mats slip on polished floors.

Scott, L.J.: Does not the totality of the facts disclose a common interest between the plaintiff, the surgeon and the hospital which makes her an invitee, apart from any question of contract?

Wallington, K.C.: The hospital has no interest in the plaintiff's consultation with the surgeon.

Scott, L.J., referred to *Hayward* v. *Drury Lane Theatre* (6).

Slesser, L.J.: If the hospital had not provided facilities for the surgeon's treatment of the patient, the plaintiff would not have booked the private ward.

Eve, J., referred to *Coleshill* v. *Manchester Corporation* (7).

Wallington, K.C.: The danger, if any, was a very usual one. The defendants can only be held liable here if the mere fact that the accident happened is taken to show that the defendants did not take reasonable steps to make their premises safe.

F. Van den Berg, K.C., and *Gilbert Paull*, for the respondents were not called upon.

Slesser, L.J.: This is a difficult case in one sense, because what primarily has to be determined in it as the measure of liability of the appellants, the Westminster Hospital, is the position which the plaintiff occupied in law with regard to the hospital at the time when she met with her accident. As is pointed out by Lord Hailsham, L.C., in the case of *Addie* v. *Dumbreck* (1):

> The duty which rests upon the occupier of premises towards the persons who come on such premises differs according to the category into which the visitor falls. The highest duty exists towards those who fall into the first category, and who are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care to see that the premises are safe.
>
> In the case of persons who are not there by invitation, but who are there by leave or licence, express or implied, the duty is much less stringent—the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the occupier.

In the present case I have come to the conclusion that this lady was not only upon these premises, but also in the room in which the casualty occurred to which I shall later refer, by the invitation, express or implied, of the hospital authorities, and was what in law is called an invitee.

The reason why I have come to that conclusion is this. This lady had an invalid son and had arranged that he should be treated by a Mr.

Cade, who is an honorary surgeon at the Westminster Hospital. For that treatment Mr. Cade was paid a fee of 125 guineas. Through Mr. Cade, doubtless upon his advice, she reserved a room for her son in the nursing-home of the Westminster Hospital, which is situated at Hampstead, and there her son was to receive electrical treatment and be provided with food and accommodation, the treatment to be under the supervision of their honorary surgeon, Mr. Cade. For those benefits —the room, the food, the attendance and the electrical treatment— she paid the hospital nine guineas a week. The learned Judge has come to the conclusion—and I do not think that Mr. Wallington seriously disputes this part of his finding ; at any rate I agree with it—that it was an implied part of the contract that she should be allowed to go to the nursing-home and see her son at reasonable intervals and that she should also be able to consult Mr. Cade there as to her son's condition. In my view, when this matter is properly considered, there was one agreement affecting three persons : this lady, Mr. Cade and the hospital, about what was to be done at the hospital. I do not mean to say that the direct contract with regard to the nine guineas, as such, was made with Mr. Cade. It was not ; I think it was made with the hospital. But the general arrangement was that Mr. Cade was to have the supervision of the case and that she was to be allowed to go to the hospital and consult Mr. Cade, who was there in his capacity as honorary surgeon to the Westminster Hospital. That is, I think, quite free from doubt upon the evidence.

Now, that being so, it appears to be clear that this lady, when she was in the room of her son in the hospital, was clearly there under this implied contract, and *a fortiori* she was there as an invitee and was, in that capacity as an invitee, certainly entitled—as part of the general arrangement—to consult with this surgeon. Now this lady thought, no doubt very wisely, that it would be unwise to consult with a doctor in the presence of her son ; or at any rate, for some other reason which seemed good to her, she did not wish to do so. She therefore asked the surgeon whether they could not have a talk in another room. The surgeon said "Come this way," and led the lady down a passage to a room which, according to the evidence, was called the sister's office, but which was used for such purposes of consultation. In my opinion that lady went into that room as an invitee. The consultation which she had the right to have with the doctor as part of the general arrangement extended to a right to have a consultation in an appropriate room set apart for such purposes, among others, by the hospital authorities. The definition of an invitee : a person who enters premises—including this room—upon business in which he and the occupier have a common interest, seems to me completely satisfied by the conditions under which this lady went into this room. The hospital were receiving this nine

guineas as a fee which, though in terms it did not include the supervision of the surgeon, at least allowed the surgeon to exercise his skill and to supervise the treatment in the room for which this lady was paying. I think it is impossible to say that she did not enter both the patient's room—she might have chosen to have the consultation there—and the room where she went to consult with the surgeon on business in which she had a common interest not only with the surgeon but also with the hospital. Therefore I agree with the learned Judge in his conclusion that this lady in this room was an invitee.

Now, if she was such an invitee, I have stated the degree of liability which the hospital had. They had—to use Lord Hailsham's words once more—"the duty of taking reasonable care that the premises are safe." Now to that I would make this qualification: that, as was pointed out in this Court in the case of *Hall* v. *Brooklands Auto Racing Club* (2), a person who invites another person on to his premises is not an insurer. The duty is stated by Scrutton, L.J., in that case at p. 217, quoting the words of Buckley, L.J., in the case of *Norman* v. *Great Western Railway Company* (3): that—briefly—the duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know; if the danger is not such that he ought to know it, his liability does not extend to it. Greer, L.J., in the same case at p. 223, quotes with approval a *dictum* of the late McCardie, J., in the case of *Maclenan* v. *Segar* (4), at p. 332:

> Where an occupier of premises agrees for reward that a person shall have a right to enter and use them for a mutually-contemplated purpose, the contract between the parties (unless it provide to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of anyone can make them. The rule is subject to the limitation—

and, *a fortiori*, subject to the limitation where there is no contract—

> that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill.

And, if I may be permitted to quote an observation of my own, in the same case at p. 231, I say:

> No person can be under a legal obligation to guard against that which he has no legal duty to anticipate. Indeed, he is not an insurer of the safety of his invitees.

And, as I say, in such cases as these, he is certainly not an insurer.

Therefore the whole case up to this point seems to me to resolve itself into this: was there here, in the circumstances, a danger of which the hospital knew or ought to have known?—because it is conceded that, if there were such danger, no care was taken to prevent damage from it. That really is the point of this case. This is not so much a case of reasonable precaution taken against danger, but a case of whether there was any duty to anticipate danger at all. Now, in my view there

was evidence here to justify the learned Judge in coming to the conclusion that there was danger which ought to have been known. The learned Judge finds that the secretary of the hospital had said that the floor had been highly polished for antiseptic purposes. His Lordship said :

> The defendants must have known perfectly well that this floor was highly polished. In fact, their secretary says that it had to be highly polished for antiseptic purposes ; and if they choose to put mats down on that antiseptic and highly-polished floor, they ought, in my judgment, to take some precaution to prevent the mats slipping.

I do not think it necessary here to reconsider the evidence beyond saying that, in my view, there was ample evidence on which the learned Judge could come to the conclusion that this was not an ordinary domestic floor which has linoleum upon it ; it was a floor which had been specially treated for sanitary purposes : constantly rubbed and highly polished. Being so, it was a floor which presented circumstances of unusual danger. When in conjunction with that floor is placed a small mat on which anybody might be likely to tread, I think this was a case where the hospital ought to have known that there was likely to be danger from this conjunction. I think it is a case where admittedly no precaution was taken to guard against that danger ; I think the lady was an invitee in the room in which the consultation took place ; and for all these reasons I think that the learned Judge was entitled to find that such damage as she sustained could rightly be laid to the charge of the Westminster Hospital. It follows, therefore, that this appeal fails and must be dismissed with costs.

SCOTT, L.J. : I agree. I think that the judgment of HORRIDGE, J., was in all respects right, and I have only one small criticism to make ; that is, concerning his use of the phrase "licensee for payment," which, he says, is a phrase which had been used by SCRUTTON, L.J. Apart from contracts which modify the ordinary measure of duty in regard to persons on premises to protect them from danger, the common law recognises three classes of different relationships and different duties : the trespasser, the licensee, and the invitee. I rather think, personally, that it is a pity to introduce a new phrase such as "licensee for payment." I say that, although in his judgment the learned Judge makes it quite clear what he means, because he goes on to say that he thinks that it was a necessary implication of the contract between the plaintiff and the hospital—that she should have the use of a room for her son at a certain rate of payment—that reasonable facilities for consultation with the doctor in attendance should be included in that contract. When he used the phrase "licensee for payment," I suspect that he was answering an argument which had been addressed to him that the plaintiff was only a licensee, and saying : "You call her a licensee ; she was there, no

doubt, by the licence of the defendants, but she was entitled to be there because she had made a payment for the use of the room where her son was which carried with it the use of some other convenient room for consultation purposes." With that one comment on the use of a term of art: "licensee for payment," which I do not think the learned Judge intended to be a term of art, I am in complete agreement with his judgment and should arrive at the same conclusions of fact. I think that here there was a very real source of danger which would naturally not be observable by anyone coming into the room but which the hospital authorities must, as a matter of commonsense, have known to be there. We all know how easy it is to slip over a mat on a slippery floor. We also know how easy it is not to notice that the floor is slippery. For these reasons I entirely agree with the judgment of the learned Judge.

Eve, J.: I regret that I cannot altogether adopt the same view of the plaintiff's position as my colleagues. In the room wherein the accident occurred I think she was a licensee and not an invitee. If she was, she would not in my opinion be entitled to the relief which she has obtained in this action. But, inasmuch as the learned Judge in the Court below and both my learned Brethren think otherwise, I fully recognise that I must be mistaken in the view which I have adopted on this occasion.

Appeal dismissed with costs. Order for payment out to the plaintiff of the amount in Court.

Solicitors: *Trollope, Winckworth, Crump & Sprott* (for the appellants); *Thomas Cooper & Co.* (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

Re LIDDELL'S SETTLEMENT TRUSTS, LIDDELL *v.* LIDDELL

[COURT OF APPEAL (Slesser, Romer and Greene, L.JJ.), **February 24, 25, 1936.**]

Infants—Wards of court—Order to bring wards within jurisdiction—Jurisdiction of court—Writ of sequestration—Enforcing order against British subject domiciled in England resident abroad.

On July 24, 1935, Mrs. L. took the four infant children of her marriage with Mr. L. to America. On Aug. 2, Mr. L. made a settlement upon the children and at once instituted proceedings to administer the trusts of the settlement. The children thus became wards of court. Application was then made for an order restraining Mrs. L. from keeping the children out of the jurisdiction. On Sept. 25 an order was made by the Vacation Judge ordering Mrs. L. to bring the children within the jurisdiction and allowing the plaintiffs to serve such order out of the jurisdiction. That order was served on Mrs. L. on Oct. 11, 1935, in New York. On Nov. 27, the order not having been complied with, a writ of sequestration was issued in respect of all Mrs. L.'s property in England, and Mrs. L. thereupon moved the court to discharge the order and the writ. LUXMCORE, J., refused to discharge or vary the order. On appeal:

HELD: (i) the court had full jurisdiction to make the order and order service thereof although Mrs. L. was out of the jurisdiction.

(ii) the jurisdiction was rightly exercised for the benefit of the children.

(iii) the fact that the enforcement of the order might not be for the benefit of the children ought not to be taken into consideration since the court assumes that its orders will be obeyed.

[**EDITORIAL NOTE.** The main point dealt with in the judgments herein is the existence of the jurisdiction to make a mandatory order against a person resident out of the jurisdiction. That this jurisdiction exists in the case of wards of court has not been seriously questioned since the decision in *Hope* v. *Hope* (1854), 4 De G.M. & G. 328, and it would appear that its existence cannot be seriously questioned now. In that case, however, LORD CRANWORTH dealt at some length with the desirability of making such an order, even though the jurisdiction to do so be undoubted. Speaking on this question of desirability, he says at p. 347: "There might be cases in which it would be improper that I should attempt to exercise it. . . . I should feel that I was doing no good, but incurring a sort of scandal as every court does, if it attempts to make an order which it has no power of enforcing." Even though in the present case the conditions exist which LORD CRANWORTH thought sufficient to justify him in making the order, viz.: the presence of the husband, and the wife having property, within the jurisdiction—yet having regard to the changes that have taken place in the position of married women since 1854, their ability to-day of obtaining remunerative employment, and the increased facilities for transference of property out of the jurisdiction, it would have been helpful if the court could have seen its way to deal with this question of desirability having regard to the conditions which now prevail. There must be few cases now where the court could enforce such an order against any determined opposition.

FOR THE LAW AS TO SUCH ORDERS, see HALSBURY, Hailsham Edn., Vol. 17, p. 719, para. 1471, and FOR THE CASES, see DIGEST, Vol. 28, pp. 338-340, Nos. 2052-2073.]

Cases referred to :

(1) *Re Aktiebolaget Robertsfors & La Société Anonyme des Papéteries de L'Aa*, [1910] 2 K.B. 727 ; 2 Digest 555, *1869*.
(2) *Re Busfield, Whaley* v. *Busfield* (1886), 32 Ch.D. 123 ; 10 Digest 848, *5604*.
(3) *Duder* v. *Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132 ; 11 Digest 348, *345*.
(4) *Hope* v. *Hope* (1854), 4 De.G.M. & G. 328 ; 28 Digest 336, *2036*.
(5) *R.* v. *Pinckney* [1904] 2 K.B. 84 ; 16 Digest 249, *495*.
(6) *Portarlington* (*Lord*) v. *Soulby* (1834), 3 My. & K. 104 ; 11 Digest 480, *1332*.
(7) *Norris* v. *Chambres* (1861), 3 De.G. F. & J. 583 ; 11 Digest 348, *341*.
(8) *Stuart* v. *Bute* (*Marquess*) (1861), 9 H.L.Cas. 440 ; 28 Digest 337, *2045*.
(9) *British South Africa Co.* v. *Companhia de Mocambique*, [1893] A.C. 602 ; 11 Digest 346, *334*.
(10) *British Controlled Oil Fields, Ltd.* v. *Stagg* (1921), 127 L.T. 209 ; 11 Digest 352, *368*.
(11) *Penn* v. *Baltimore* (1750), 1 Ves.Sen. 444 ; 11 Digest 351, *363*.
(12) *Marshall* v. *Marshall* (1888), 38 Ch.D. 330 ; Digest Practice 354, *683*.
(13) *Re Burland's Trade Mark, Burland* v. *Broxburn Oil Co.* (1889), 41 Ch.D. 542 ; Digest Practice 365, *761*.
(14) *Tozier* v. *Hawkins* (1885), 15 Q.B.D. 680 ; Digest Practice 354, *686*.
(15) *Stephens* v. *James* (1833), 1 My. & K. 627 ; 28 Digest 222, *817*.
(16) *Re Spence* (1847), 2 Ph. 247 ; 28 Digest 273, *1251*.
(17) *Boyle* v. *Sacker* (1888), 39 Ch.D. 249 ; 11 Digest 124, *223*.

Appeal from a mandatory order on Mrs. C. Liddell, to bring her children, or cause them to be brought, to England from the United States of America, made by Greaves-Lord, J., on Sept. 25, 1935 ; and from a judgment of Luxmoore, J., refusing to discharge or vary the said order, delivered on Jan. 24, 1936.

On July 24, 1935, Mrs. C. Liddell, wife of Mr. G. M. Liddell, left for the United States of America, taking with her the four young children of the marriage. Both parents were domiciled in England. On Aug. 2, a settlement of a fund of £200 was made on the children by the father, and on Aug. 6 the children, through their father as next friend, issued a writ in an action to administer the trusts of the settlement, making the trustees of the settlement defendants. The children thereby became wards of court. On Sept. 25, Greaves-Lord, J., on an *ex parte* application by the plaintiffs, issued an order on Mrs. Liddell to bring the children within the jurisdiction before Oct. 16 or within 21 days after service of the order upon her. That order was served upon Mrs. Liddell, who was then in America, on Oct. 11. As Mrs. Liddell did not comply with this order, the plaintiffs on Nov. 27 issued a writ of sequestration of all her property in England under R.S.C. Ord. XLIII, r. 6. On Dec. 16, Mrs. Liddell, through her solicitors in England, gave notice of motion to discharge the order and the writ. On Jan. 24, Luxmoore, J., heard the motion and delivered judgment holding that the order having been passed and entered he had no jurisdiction to vary or discharge it, and was, in any case, prohibited from varying it by R.S.C. Ord. LXIII, r. 12.

Mrs. Liddell appealed from the order of GREAVES-LORD, J., and the judgment of LUXMOORE, J.

F. K. Archer, *K.C.*, and the *Hon. G. L. Bathurst* for the appellant: There was no jurisdiction in GREAVES-LORD, J., to grant an injunction against a person who was outside the jurisdiction, ordering that person to perform an act outside the jurisdiction. R.S.C. Ord. XI, r. 8*a* does not allow service out of the jurisdiction except where R.S.C. Ord. XI, r. 1 would allow it: *Re Aktiebolaget Robertsfors and La Societe Anonyme des Papeteries de L'Aa* (1). R.S.C. Ord. XI, r. 1 (*f*) provides for the service of writs abroad, but only of those issued with regard to some act to be done in England: *Hope* v. *Hope* (4). In this case the wife had only to give authority, which she could do in England, for steps to be taken in a foreign court. No authority exists for service outside the jurisdiction with a view to enforcing the doing of an act outside the jurisdiction. At common law the remedy when a mother wrongly takes children out of the country is a writ of *habeas corpus*. Common law jurisdiction is not extra-territorial: *R.* v. *Pinckney* (5). In *Lord Portarlington* v. *Soulby* (6), which illustrates the equitable jurisdiction, an order rightly issued to a person within the jurisdiction to prohibit an act outside it, but would not have issued had the person also been outside the jurisdiction. If an order can only be made effective through the intervention of a foreign tribunal, it will not be made: *Norris* v. *Chambres* (7), at p. 584, where LORD CAMPBELL, L.C. says:

> An English court ought not to pronounce a decree, even *in personam*, which can have no specific operation without the intervention of a foreign court, and which, in the country where the lands to be charged by it lie, would probably be treated as *brutum fulmen*.

In *Stuart* v. *Marquess of Bute* (8), where the defendant held estates in England and in Scotland, the House of Lords, which has jurisdiction over both the English and the Scottish courts, held that for the benefit of the infant each court should make the relevant order on the guardians who were within its own jurisdiction. In the present case the correct procedure is to request the courts of the United States of America to make an order *in personam* on the mother. R.S.C. Ord. XI, merely states the circumstances in which a case can be brought before the court at all. It does not enlarge the jurisdiction of the court but only enlarges the class of persons within that jurisdiction.

GREENE, L.J.: In *Duder* v. *Amsterdamsch Trustees Kantoor* (3) the court gave leave to serve a writ out of the jurisdiction on the Dutch trustee corporation as a necessary party to the action, under R.S.C. Ord. XI, r. 1 (*g*). BYRNE, J., there said that the effect of the rule was not to extend the jurisdiction but to enable the old jurisdiction to be exercised in a case where at one time it could not have been exercised by reason of defective rules of procedure.

Archer, K.C.: That case is equally consistent with the proposition that the only extension of jurisdiction made by the rule is an extension of the class of persons to be brought before the court. Equitable jurisdiction depends on the presence of the defendant. The Dutch courts were not asked to do anything. (*British South Africa Co.* v. *Companhia de Mocambique* (9); *British Controlled Oil Fields, Ltd.*, v. *Stagg* (10); *Penn* v. *Baltimore* (11); *Marshall* v. *Marshall* (12). *Re Burland's Trade Mark* (13) is distinguishable.)

Greene, L.J.: In *Tozier* v. *Hawkins* (14), although the defendant was in Ireland, the court granted an injunction, holding that it could be made effective as the defendant sometimes came to England. That injunction was granted on discretion and not on jurisdiction.

Archer, K.C.: The present order could be enforced by attachment if Mrs. Liddell came to England, but because it could only be enforced in this way, it is not a proper one in the interests of the infants. In *Stephens* v. *James* (15) money was sent to America for the upkeep of an infant in similar circumstances. *Hope* v. *Hope* (4) does not govern this case.

Further, the injunction was bad because there was no effective means of enforcing it, and equity does nothing in vain. The only means of enforcement is the writ of sequestration, issuing without leave at the instance of the plaintiff. The effect is to deprive the mother of the means of supporting her children. This is not a proper way of enforcing an order made primarily in the interests of the infants. The writ of sequestration issues to punish a party for the disobedience of an order commanding the party to do something or abstain from doing something within the jurisdiction. Sequestration is an indirect means of enforcing an order made *in personam*. It would be a direct means only if it affected property which was the subject of the action. A writ of sequestration against a company can only issue by leave of the court. The court will interfere to protect an infant even where there is no property, but will not act if it cannot act directly: *Re Spence* (16).

Further, in the circumstances of the case the order ought not to be maintained, as it is not in the infants' interests.

On the refusal of Luxmoore, J., to interfere with the order: although an order made by a vacation judge is of equal validity with any other, it has no superior validity. Luxmoore, J., could have discharged an order of his own; he could equally have discharged this one. Discharging an order is not the same as reversing or varying it: *Boyle* v. *Sacker* (17).

Bathurst: Greaves-Lord, J., had not the material on which he could give effect to the principles of equitable jurisdiction. This Court has not before it sufficient material to justify the order, and should alter the order and discharge the writ of sequestration. There was no evidence before Greaves-Lord, J., that the defendant had any property within

the jurisdiction on which the writ could operate. So far as he could see, his order would be ineffective. In the circumstances, it is not in the infants' interests to sequestrate the wife's property.

Harman, K.C., and *Turnbull*, for the respondents, were not called upon.

SLESSER, L.J.: This appeal is from an order of GREAVES-LORD, J., made on Sept. 25, 1935. The terms of that order are as follows:

> Upon motion this day made unto this Court by counsel for the plaintiffs and no one appearing for the respondent, the Honourable Calypso Liddell, although she had been duly served with notice of this motion as by affidavit appears; and upon reading three orders dated respectively Aug. 7 and 28 and Sept. 18, 1935; and Guy Maynard Liddell by the plaintiffs' counsel, being his counsel for that purpose, undertaking to abide by any order which this Court may hereafter make with regard to the reimbursement by him to the respondent of the costs of bringing back the infant plaintiffs to England pursuant to this order; this Court doth order that the respondent, the Honourable Calypso Liddell, the mother of the infant plaintiffs, do bring or cause to be brought the infant plaintiffs within the jurisdiction of this Court on or before Oct. 16, 1935, or subsequently within twenty-one days after service of this order upon her; and it is ordered that the plaintiffs be at liberty to serve this order upon the respondent in the United States of America or elsewhere out of the jurisdiction of this Court.

The facts of this case, so far as they are material to the present appeal, are these. Mr. and Mrs. Liddell have four infant children of tender years. They and the children, all being British subjects, were before July, 1935, domiciled and resident in this country. On July 24, 1935, Mrs. Liddell sailed to America and took with her the four children of the marriage. After she had so left there was a settlement made on Aug. 2, 1935, between Mr. Liddell and trustees, covenanting with the trustees to pay them a certain sum for the benefit of the infants and providing that the trustees should stand possessed of the sum in trust for the benefit of all or any of the infant children. On the same date, namely, Aug. 2, 1935, proceedings were taken in the Chancery Division in the matter of the trusts of the settlement of Aug. 2 between Guy Maynard Liddell and Cecil Frederick Joseph Liddell and David Edward Liddell, who were made defendants in the action, asking for execution of the trusts of the said settlements. The defendants being sued as trustees of that settlement, the infants hereby became wards of court, and they have been treated, and must be treated, therefore, upon that footing and the court becomes concerned to protect them as would a good parent.

The next matter which has to be noted is that during the long vacation of 1935 applications were made at various dates to the Vacation Judge to restrain Mrs. Liddell from keeping the children out of the jurisdiction of the Court. An *ex parte* injunction was granted on Aug. 7, 1935, by HILBERY, J., and on Aug. 26, 1935, a further interim injunction, and by leave of the court these orders were served upon Mrs. Liddell in New

York on Sept. 16, 1935. Those are not the orders, however, in relation to which the present appeal is brought. The order from which the present appeal is brought, namely, that of Sept. 25, 1935, was obtained in the following way. An order was obtained for substituted service on Messrs. Gordon, Dadds & Co., solicitors for Mrs. Liddell, which is dated Sept. 18, 1935, and on motion it is recited in that order, an affidavit of Mr. Liddell being read :

This Court doth order that the plaintiffs be at liberty to serve the Honourable Calypso Liddell with notice of motion for a mandatory injunction for Wednesday, Sept. 25, 1935, and this Court doth order that service of the said notice of motion by leaving the said notice together with a copy of this order at the office of Messrs. Gordon, Dadds & Co. at 11 &12, St. James's Place, London, S.W.1, be deemed good service of the said notice upon the said the Honourable Calypso Liddell.

On the matter coming on for hearing on Sept. 25, the court made this order :

This Court doth order that the respondent the Honourable Calypso Liddell, the mother of the infant plaintiffs, do bring or cause to be brought the infant plaintiffs within the jurisdiction of this Court on or before Oct. 16, 1935, or subsequently within twenty-one days after service of this order upon her, and it is ordered that the plaintiffs be at liberty to serve this order upon the respondent in the United States of America or elsewhere out of the jurisdiction of this Court.

As appears from an affidavit of Mr. George Gordon, a member of the firm of Gordon, Dadds & Co., that order was served upon Mrs. Liddell on Oct. 11, 1935. It is not necessary to consider the effect of the earlier order of Sept. 16, 1935, as to the earlier injunctions, partly because they are not the subject of this appeal and partly because they were short in time, and therefore inoperative in their purpose, the necessary two days not being present. But I think this is important to be observed, namely, that the order here appealed from was served upon Mrs. Liddell in New York on Oct. 11, 1935, as appears from the affidavit of her solicitor.

In those circumstances it is argued that Greaves-Lord, J., has erred in making this order and, it follows, a consequential order for sequestration which was made as the result of disobedience to that order. That such notice could properly be served upon Mrs. Liddell is, I think, beyond dispute. Mrs. Liddell is herself a British subject and married to a British subject, and is without question domiciled or ordinarily resident within the jurisdiction. That is one of the grounds on which, under R.S.C. Ord. XI, r. 1 (*c*), service of a writ may be made out of the jurisdiction. In this case the question of service of writ does not arise, because in form this is an action in which the defendants are not this lady at all, but rather the trustees of the infants' settlement, and the

case falls under R.S.C. Ord. XI, r. 8 (*a*), which provides that service out of the jurisdiction may be allowed by the court of :

> (*d*) Any summons, order or notice in any proceedings duly instituted whether by writ of summons or other such originating process as aforesaid.

Those words in themselves are extremely wide and might be taken to have enlarged the reasons which are stated in R.S.C. Ord. XI, r. 1, for being the reasons for the service of the writ out of the jurisdiction. But our attention has been called to the case of *Re Aktiebolaget Robertsfors and La Societe Anonyme des Papeteries de L'Aa* (1), in which it was said that there is

> no jurisdiction under Ord. XI, r. 8*a*, of the Rules of the Supreme Court, 1883, to grant leave for service out of the jurisdiction of a summons, order, or notice, except in the circumstances in which there is jurisdiction under R.S.C. Ord. XI, r. 1, to grant leave for service of a writ of summons out of the jurisdiction.

But in this case, as I have said, there was sufficient power, if there had been a writ of summons, to serve it out of the jurisdiction by reason of the fact that the relief was sought against a person domiciled or ordinarily resident within the jurisdiction. In those circumstances, it seems to me that this lady was one who was within the reach of the court, and I think that the principle which we have here to consider is very clearly stated in KERR ON INJUNCTIONS, 6th Edn., p. 11, to this effect :

> In granting injunctions the court operates *in personam*. The person to whom its orders are addressed must be within the reach of the court or amenable to its jurisdiction. But the court will not suffer anyone within its reach to do what is contrary to its notions of equity, merely because the act to be done may be, in point of locality, beyond its jurisdiction. As a consequence of the rule that in granting an injunction the court operates *in personam*, the court may exercise jurisdiction independently of the locality of the act to be done, provided the person against whom relief is sought is within the reach and amenable to the process of the court. This jurisdiction is not grounded upon any pretentions to the exercise of judicial or administrative rights abroad, but on the circumstance of the person to whom the order is addressed being within the reach of the court.

This lady has been properly served and is, in my opinion, within the reach of the court. We were told that there was little or no authority upon the particular point as to whether in such circumstances there was or was not jurisdiction. One has to have regard to this fact : that before the General Orders of 1883, as was pointed out by COTTON, L.J., in *Re Busfield* (2) :

> Service out of the jurisdiction is an interference with the ordinary course of the law, for generally courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction.

Then he says, speaking of the General Orders of 1883, which are the ancestors of the present R.S.C. Ord. XI and its consequential rules :

> We must deal with the present case under the General Orders of 1883, and there is nothing in them to authorise service of an originating summons out of the

jurisdiction. The General Order as to service out of the jurisdiction was in my opinion intended to form a complete code on that subject, and to show when such service could, and when it could not, be effected.

Such a machinery for dealing with these orders is procedural only; it is not in itself any change in the law, but is really an adjectival matter, enlarging the proceeding. I think that is made quite clear in the case of *Duder* v. *Amsterdamsch Trustees Kantoor* (3). There, in an action against a Dutch corporation and the receivers to enforce an alleged prior equitable charge, made in England, on property and assets in Brazil, relief was sought *in personam*. The difficulties with regard to foreign land need not concern us; but this was argued at p. 137 by Mr. Levett:

It is only by operating *in personam* and not *in rem* that the court makes any order respecting property situate out of the jurisdiction and there is no precedent for the exercise of the jurisdiction *in personam* unless the defendant, against whom relief is sought, is within the jurisdiction.

That argument did not find favour with Byrne, J., who decided the case. He says at p. 142:

But it is argued that there is no precedent or authority for the exercise of the jurisdiction *in personam*, unless against persons actually within this country, and that to allow service of notice of writ upon a foreigner resident abroad, and then to act *in personam* against him, would in effect be to enlarge or extend the jurisdiction of the court in a manner not authorised by principle or authority. It has been several times laid down that the rules under the Judicature Acts are rules of procedure only, not intended to affect, and not affecting, the rights of parties.

Again, on p. 143 he says:

In the present case, the service is authorised by the terms of the rule I have referred to, and I consider that to allow service in accordance with that rule is not to extend jurisdiction, but to enable the old jurisdiction to be exercised in a case where, at one time, it could not have been exercised by reason of defective rules of procedure.

In other words, though it may from time to time be a question to be considered whether the adjectival machinery is sufficient to let an order, addressed to persons out of the jurisdiction, be addressed so as to bring them within the reach of the court, the principle that, when an order is addressed to persons so as effectively to bring them within the reach of the court, the court may grant an injunction *in personam* independently of the locality of the act to be done, is not affected by the particular case with which the person may or may not be brought within the jurisdiction of the court. That, to my mind, is made quite clear by a case which was cited to us by Mr. Archer, namely, the case of *Hope* v. *Hope* (4). That was a decision in 1854. In those days it was well-nigh impossible to serve persons out of the jurisdiction; but the lady against whom the order was there sought to compel her, being a married woman, to bring her children back within the jurisdiction had, in the opinion of the Lord Chancellor, by her actions submitted to the jurisdiction.

She was therefore, in effect, in the same position as would now be a person to whom a writ or notice had properly been addressed under the existing rules. Being in that position that she had submitted to jurisdiction, she was ordered by the Lord Chancellor in the first place to concur with her husband in taking necessary steps for the purpose of delivering up the children to him with a view to being brought over and educated in England ; and, on a difficulty arising that the French Courts seemed to think that, the case being on appeal to the House of Lords from the Lord Chancellor sitting by himself, the order ought not to be made ; then, after necessary and consequential amendments of the order, finally the Lord Chancellor (at p. 355) pronounced in form :

> That by the law of this country an appeal to the House of Lords does not suspend the operation of my order ; and with that declaration I shall order her within a week to deliver up these children to their father, or otherwise to concur with him in taking such steps as may be necessary for authorising them to be delivered up to him according to the laws of *France.*

In other words, once the Lord Chancellor was satisfied that the lady had been brought within the jurisdiction of the court and was amenable to the court's order, he had no hesitation in ordering, or, at any rate, after consideration did order her, though being abroad with the children in a foreign country, to deliver them up to the father. That seems to me to be a useful case in illustrating the general principle, and, that being so, I am clearly of opinion that GREAVES-LORD, J., had full jurisdiction to make the order.

The rest of the objection which is taken is that this Court will not make an order *brutum fulmen* or will not make an order which cannot be made effective. I am not satisfied—I think it was primarily a matter for the learned Judge—that this order cannot be made effective. It seems to me that, among other means which can be used and have been used, there is this writ of sequestration. I do not think we are to assume that this lady necessarily will disobey the order of the court or will disobey the sanctions she will have to suffer if she continues contumacious.

I am clearly of opinion that the court can make such orders efficacious ; and, once a jurisdiction is established and the fact is established that the court is concerned as a guardian under its trust of these children, that GREAVES-LORD, J., was right in making the order which he did.

I have said nothing about the second appeal, and I may perhaps just dispose of it with this observation. There being later made an application to LUXMOORE, J., in term to discharge the order made by GREAVES-LORD, J., he came to the conclusion that he had no jurisdiction to interfere with the order by reason of the operation of R.S.C. Ord. LXIII, r. 12, which deals with orders made in vacation. However that may be, if, as we think, GREAVES-LORD, J., had full jurisdiction to deal with this matter in the way he did, and there being no suggestion of any change of

circumstances since that time justifying a variation of that order, it follows that the second appeal must be dismissed and follow the fate of the first.

Romer, L.J.: I entirely agree. It is plain that this Court has jurisdiction to order a person in this country to perform an act abroad. That indeed is admitted; but it is said that this Court has no jurisdiction to order a person resident abroad to perform an act in a foreign country. I know of no authority for any such proposition and, notwithstanding the strenuous arguments that we have heard, it appears to me that the proposition is wholly untenable. The moment that a person is properly served under the provisions of R.S.C. Ord. XI, that person, so far as the jurisdiction of a court is concerned, is in precisely the same position as a person who is in this country.

Then it is said that even if there was jurisdiction to make the order, Greaves-Lord, J., ought not to have made it. It is said, in the first place, that it was not for the benefit of the children. I agree that the benefit of the children is the first thing to be considered, and, in my opinion, it is plain that children of British parents, wards of court, should not be permanently resident abroad; it is plainly right for the benefit of these children that they should be brought back to this country.

Then it is further said that, even if that be so, this order could only be enforced against the lady, if she chooses to disobey it, by the sequestration of her income, and that is not for the benefit of the children. So far as that is concerned, I will only say this. It is not the habit of this Court, in considering whether it will or will not make an order *in personam*, to assume that the order is going to be disobeyed; the court assumes its orders will be obeyed and makes them on that supposition. I have nothing else to add, except to say that this appeal fails and must be dismissed.

Greene, L.J.: I am so entirely in agreement with the judgments which have already been pronounced that I do not think I can usefully add anything further to them.

Appeal dismissed with costs.

Leave to appeal to the House of Lords refused.

Solicitors: *Gordon, Dadds & Co.* (for the appellant); *William Charles Crocker* (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

WATTS *v.* THE OFFICIAL SOLICITOR.

[COURT OF APPEAL (Slesser and Scott, L.JJ., and Eve J.), **February 17, 1936.**]

Practice—Official Solicitor representing deceased defendant—Notice of change of solicitors by Official Solicitor—Substitution of Official Solicitor for solicitor on record.

The Official Solicitor, on appointment to defend an action in place of a deceased defendant, gave notice of change of solicitors and substituted his name for that of the solicitors on the record as acting for the deceased defendant, who were also the solicitors of the deceased's insurance company. On summons for directions issued by the plaintiff, counsel for the solicitors moved the learned Judge to order that the Official Solicitor should leave the control of the defence in the hands of the said solicitors, and that they should remain on the record, and that the notice of change of solicitors should be removed from the file. The learned Judge accordingly varied in this sense his original order appointing the Official Solicitor to represent the deceased defendant. The Official Solicitor appealed :—

HELD : as the Official Solicitor had the same right as any other litigant to choose who should be his solicitor, and was entitled to act for himself, he was entitled to control the defence of himself as representative of the deceased defendant and the change of solicitor on the record was properly made, and the learned Judge had no jurisdiction to make the variation complained of.

[**EDITORIAL NOTE.** The difficulty here arises from the dual position of the Official Solicitor. He may be both a party and a solicitor and thus acting as a solicitor for himself. He is entitled either to act for himself or to employ another solicitor or firm of solicitors to act for him. He has, therefore, a perfect right to act for himself and he may, therefore, subject to giving the proper notices and providing for costs if necessary, displace a solicitor previously acting in the matter. Under R.S.C. Ord. XVI, r. 46, the court may appoint a person to represent the interest of a deceased's estate, which saves the expense of constituting a personal representative and adding him as a party.

FOR THE POWERS AND DUTIES OF THE OFFICIAL SOLICITOR, see Supreme Court of Judicature (Consolidation) Act, 1925, s. 129. FOR LAW ON CHANGE OF SOLICITORS, see R.S.C. Ord. VII, rr. 2, 3, 4, YEARLY SUPREME COURT PRACTICE, 1936, pp. 49-54 ; and FOR CASES, see DIGEST, Vol. Practice, pp. 55-57, Nos. 464-489.]

Case referred to :

(1) *Re Dunn, Simmons* v. *Liberal Opinion, Ltd.* [1911] 1 K.B. 966 ; 42 Digest 343, *3874.*

APPEAL from an order made on Jan. 22, 1936, by ATKINSON, J., upon a summons for directions, varying an order previously made by him on Nov. 14, 1935, by adding a direction that the Official Solicitor do leave the control of the defence of the deceased defendant in the hands of the solicitors for the deceased's insurance company ; that these solicitors should remain in record ; and that notice of change of solicitor should be removed from the file.

A Mr. Watts was killed in a motor accident and his widow, Annie Watts, sued two defendants, named Kennedy and Pallett, for negligently

causing his death. She issued her writ on May 11, 1935. On June 8, 1935, the defendant Kennedy was killed in another accident. At the time of the first accident Kennedy was insured against third-party claims by the Eagle Star Insurance Co., Ltd. At Kennedy's death the plaintiff's cause of action against him subsisted against his estate by the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1). She desired to obtain a judgment against Kennedy's estate in order that she might sue the insurance company under the Road Traffic Act, 1934, s. 10. For this purpose it was necessary that Kennedy's estate should be represented by some person, and the plaintiff elected to apply under R.S.C. Ord. XVI, r. 46 for the appointment of a representative. The Official Solicitor consented to act and was appointed by an order made on Nov. 14, 1935, by Atkinson, J., on the plaintiff giving an undertaking to pay all his costs.

Up to this time the solicitors whose names appeared on the record as acting for the defendant Kennedy were Messrs. W. C. Crocker. The Official Solicitor, desiring to act in this case as his own solicitor, gave notice of change of solicitors on Nov. 21, 1935. Messrs. Crocker thereupon claimed still to represent the defendant Kennedy, and demanded that the Official Solicitor should withdraw his notice of change. Correspondence took place in which the Official Solicitor offered to employ Messrs. Crocker as his solicitors; Messrs. Crocker, however, pointed out that they were also the solicitors acting for the Eagle Star Insurance Co., and that the deceased's policy obliged him to employ them as his solicitors; they maintained that the notice of change was unnecessary and improper.

On Dec. 30, 1935, the plaintiff's solicitors issued a summons for directions. At the hearing of their application before Atkinson, J., on Jan. 22, 1936, Messrs. Crocker were represented by counsel, who stated that the Official Solicitor had refused to allow Messrs. Crocker to act and had improperly removed their name from the record, thus seriously damaging both the plaintiff and the insurance company. Atkinson, J., thereupon made an order varying his original order (*inter alia*) in the following terms:

> That the order herein dated Nov. 14, 1935, be varied by adding a direction that the Official Solicitor do leave the control of the defence of the deceased defendant in the hands of the solicitors for the deceased's insurance company and that these solicitors do remain in record; and that notice of change of solicitor dated Nov. 21, 1935, be removed from the file as of to-day's date; and that a plan of the *locus in quo* be agreed.

The Official Solicitor appealed.

Sir Donald Somervell, K.C., S.-G., and *Hubert Hull*, for the Official Solicitor: The Official Solicitor is entitled to act as his own solicitor. Although Messrs. Crocker's name remained on the record, in accordance with practice, they had no retainer after the death of Kennedy and were

not in fact acting for him or his estate. The notice of change of solicitor and the consequent change on the record were in order. The learned Judge took no note, as this was a summons under the new procedure rules, but he apparently based his decision on the Supreme Court of Judicature (Consolidation) Act, 1925, s. 129. The learned Judge had no jurisdiction to vary the order under which the Official Solicitor was appointed.

H. D. Samuels, K.C., (*R. Armstrong-Jones with him*), claimed to be heard on behalf of Messrs. W. C. Crocker, solicitors for the Eagle Star Insurance Co., Ltd., who also claimed to act as solicitors for the estate of the deceased defendant Kennedy.

The Court ruled that he could not be heard, as his clients had no *locus standi* in that Court.

R. M. Everett, for the plaintiff.

D. H. B. Thornton, for the second defendant, Pallett.

SLESSER, L.J.: A difficulty arises as to the costs of these proceedings. I do not understand how Mr. Armstrong-Jones had a right of audience before the learned Judge. The only persons who might have been heard were the representatives of the plaintiff and of Mr. Pallett, the second defendant. The appellants are here on the motion of a party who was never before the court. *Re Dunn, Simmons* v. *Liberal Opinion, Ltd.* (1) decides that a solicitor assuming to act for the one of the parties to an action warrants his authority, and is personally liable to the opposing party for costs, if it turns out that the client for whom he assumed to act is non-existing or has revoked the authority. If costs are asked for against Messrs. Crocker this appeal must be adjourned for them to be heard.

H.M. Solicitor-General, *Mr. Everett* and *Mr. Thornton* did not ask for costs.

SLESSER, L.J.: This has been a troublesome case, which raises a question of principle of some importance. A Mr. Watts was unfortunately killed in a motor accident, and his widow, Annie Watts, sued two defendants, a Mr. Kennedy and a Mr. Pallett. Mr. Pallett survives and is still a defendant upon the record, but Mr. Kennedy was himself killed in an accident a few days after the writ was issued and is no longer, therefore, before the court. By reason of recent legislation, the Law Reform (Miscellaneous Provisions) Act, 1934 (*c.* 41), the liabilities of a deceased person may vest in or against his estate: in the language of sect. 1 (1):

> Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate.

Therefore it became necessary for Mrs. Watts, in order that she might take advantage of that section, to have Mr. Kennedy's estate before the court.

Now the way in which that was done was by invoking the machinery of R.S.C. Ord. XVI, r. 46, which provides that :

> If in any cause, matter, or other proceeding it shall appear to the court or a judge that any deceased person who was interested in the matter in question has no legal personal representative, the court or judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding, on such notice to such persons, if any, as the court or judge shall think fit.

Mr. Kennedy died without appointing an executor and without any legal representative.

The Judge, acting under that order, appointed the Official Solicitor to represent the estate of Francis Leo Kennedy. That was done with the consent of the plaintiff ; the necessary guarantees and the like as to costs were given, and for all purposes thereafter, that is, after Nov. 21, 1935, the Official Solicitor was the legal representative of the estate of the defendant Kennedy, and whatever liabilities had vested against Kennedy therefore vested under the new Act against the Official Solicitor.

Now the Official Solicitor, as his name implies, is not only the Official Solicitor ; he is also or is taken to be a solicitor for the purpose of conducting proceedings like any other solicitor ; and, speaking for myself, I think some confusion has arisen in this case between the two aspects of his activities : his activity as the representative appointed under R.S.C. Ord. XVI, r. 46, and his activity as the solicitor acting for the representative. The two persons may be the same, for he may act for himself.

The deceased had representing him, acting for him as solicitors the firm of Messrs. Crocker, who were also acting for the insurance company with whom the deceased Kennedy was insured, the Eagle Star ; they were upon the record as the solicitors for the defendant Kennedy. When the defendant Kennedy died he ceased to have a solicitor ; he ceased to be capable of giving any retainer. But we are told that the practice is in those circumstances to leave upon the record the solicitor of the deceased ; and no doubt in respect of matters which have already happened and which may still have to be dealt with and litigated, which happened before his death, there may be a reason why he is left there. However that may be, the Official Solicitor on Nov. 21, 1935, caused himself to be substituted for Mr. Crocker as the defendant's solicitor. The defendant at that time was the Official Solicitor himself, because he had been appointed by the order of Nov. 21 to be the defendant under R.S.C. Ord. XVI, r. 46. He had been the person appointed to represent the estate, and it was perfectly correct in form that he should state that he, the defendant as representative under R.S.C. Ord. XVI, r. 46, retained himself as his solicitor, which he was entitled to do.

I do not think it is necessary to go through the correspondence between Messrs. Crocker and the Official Solicitor. Both sides, I think, were a little confused as to the real situation. In the result, however, on the Official Solicitor applying, as it was necessary for him to apply under the New Procedure to the Judge on a summons for directions, the only persons at that time before the court being the plaintiff, the Official Solicitor and Mr. Pallett (the other defendant), there appeared in court Mr. Armstrong-Jones, "as," (I am reading from the Judge's order,) "counsel for the deceased defendant." It does not say "as counsel for the insurance company," nor does it say "as counsel to represent the supposed interests of Messrs. Crocker," but "as counsel for the deceased defendant." That is how he is described. I am unable to see that Mr. Armstrong-Jones had any *locus standi* in the court at all. He was not a party; he did not ask that the insurance company should be added as a party. The deceased person had ceased to take any interest in the affairs of this world, and there was nobody else at all whom he could represent. But unfortunately he was heard, and, as the result of his persuasion, the ordinary order for directions was supplemented by the following paragraph: [His Lordship read the order previously set out].

The Solicitor-General appears before this court and objects that that order is made without jurisdiction and is an invasion of the rights which a party has to choose his own solicitor; he says that, while he as Official Solicitor has been ready and willing to appoint Messrs. Crocker his agents, he does that of his own free will; that he must retain, as any other party to litigation may retain, the right to instruct as solicitor whom he will, and this is an invasion of that common law right. I think in that view the learned Solicitor-General is entirely right. I can find no jurisdiction whatever to direct that the Official Solicitor leave the control of the defence of the deceased defendant in the hands of the solicitors for the insurance company of the deceased. Under the contract of insurance between the deceased and the Eagle Star—particularly condition 3, which says that the company shall have power to settle any claim and shall be entitled to use the name of the insured for the purpose of resisting any claim, and the like; the usual conditions as to subrogation—it may or may not be the case that the insurance company have some rights, as against the Official Solicitor as representing the deceased defendant, to have some part in this action; but the plaintiff, with whose interests we are primarily here concerned, has a right *prima facie* to proceed against the person who did her husband the injury, namely, the deceased Kennedy, who is now represented by the Official Solicitor, who, by order of court under the order and rule, is properly before the court. I see nothing which gave the learned Judge any jurisdiction to vary the direction which he properly made under R.S.C. Ord. XVI, r. 46.

The order is defective in other matters which are perhaps consequential.

For example, it is ordered "that these solicitors"—that is, Messrs. Crocker—"do remain in record." Well, they are not on the record so that they can remain there; they really ceased properly to be on the record when the deceased died and have never been on the record since, though their name has been left upon the record; and since Nov. 21, 1935, the Official Solicitor has properly been upon the record.

We are told by the learned Solicitor-General that he is willing, on the instructions of the Official Solicitor, that Messrs. Crocker should act in this case for him as representative of the deceased Kennedy's estate. It is open to him to agree that there should be a change on the record now, and that, the defendant being himself the Official Solicitor, there should appear as defendant's solicitors Messrs. Crocker. That consequential arrangement can be made by agreement between the parties, but, so far as this case is concerned, in my opinion the Official Solicitor may or may not in this discretion appoint Messrs. Crocker. He has the full rights of any other defendant to choose and continue to employ any solicitors whom he wills.

It follows that this order must be varied, and that the offending paragraph beginning with the words "And it is further ordered" must be struck out, except the last words: "and that a plan of the *locus in quo* be agreed" That is another matter, which has nothing to do with us. The last line stands; the rest of that offending paragraph goes out.

We were faced at one time, or might have been, with very difficult questions as to costs, about which I say nothing; but both the Official Solicitor, the plaintiff and the defendant Pallett have said that they will not ask for any costs in this matter, and therefore in the result the appeal will be allowed, the offending matter which I have mentioned will be deleted, and the order for directions will stand without that matter.

Scott, L.J.: I agree entirely, and have nothing to add.

Eve, J.: I agree. The application of this rule is of very frequent occurrence in the other division of this court, and I have never heard before that it is not open to the party who is appointed to represent the estate to select in all respects the persons to act as solicitors.

Solicitors: *The Official Solicitor*; *Pattinson & Brewer* (for the plaintiff); *Mawby & Barrie* (for the second defendant); *W. C. Crocker* (for the respondent).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

BISHOP *v.* DEAKIN.

[CHANCERY DIVISION (Clauson, J.), **February 17, 1936.**]

Local Government—Election—Disqualification—By conviction before election —Local Government Act, 1933 (*c.* 51), *ss.* 59 (1) (*e*), 84 (1).

By the Local Government Act, 1933, s. 59 (1) (*e*) a person shall be disqualified for being elected or being a member of a local authority if he has within five years before the day of election or since election been convicted of any offence and ordered to be imprisoned for a period of not less than three months without the option of a fine.

By sect. 84 (1) " proceedings may be instituted . . . against any person acting as a member of a local authority . . . on the ground of his being disqualified for so acting . . . provided that proceedings . . . shall not be instituted after the expiration of six months from the date on which he so acted."

Mrs. D. was on July 6, 1932, convicted and sentenced to imprisonment for nine months without the option of a fine. On Nov. 1, 1934, Mrs. D. was elected a borough councillor and immediately after election she began and thereafter from time to time continued to act as a councillor. More than six months after Mrs. D. first began to act as a councillor, an action was commenced for a declaration that she had acted as a borough councillor while disqualified :—

HELD : (i) on the true construction of the Local Government Act, 1933, s. 59 (1) (*e*) the words " if he has within five years before the day of election " refer only to the disqualification " for being elected " and the words " since election " refer to the disqualification " for being a member of a local authority."

(ii) the conviction within five years before the day of her election did not disqualify Mrs. D. from continuance in office.

(iii) the words " date on which he so acted " in sect. 84 (1) of the above Act refer to the earliest date after election on which he or she so acts as the date at which the period of limitation begins to run and since the writ in the action was issued more than six months after Mrs. D had first begun to act as a councillor, the action was barred.

[**EDITORIAL NOTE.** The first point decided in this case involves a consideration of the Local Government Act, 1933, ss. 59, 71, 84. Sect. 59 sets out the disqualifications for being elected or being a member of a local authority. Sect. 71 (read with the Municipal Corporations Act, 1882 (c. 53), s. 88 (4)) provides that an election which is not questioned within 21 days by an election petition is deemed to have been to all intents a good and valid election. Sect. 84 of the Act of 1933 enables a local government elector to take proceedings against a person acting or claiming to act as a member of a local authority on the ground that he is not qualified to be or is disqualified for being a member. The time limit for proceedings against a person acting is " six months from the date on which he so acted."

This case decides that so far as the disqualification in sect. 59 (1) (*e*) is concerned, sect. 71 bars proceedings under sect. 84 for acting as a member when disqualified by conviction within five years before election. The *ratio decidendi* is applicable to similar disqualifications under sect. 59 (*c*), (*d*) and (*f*), but does not appear applicable to the other disqualifications under sect. 59, and it would seem in view of *De Souza* v. *Cobden*, [1891] 1 Q.B. 687 ; 33 Digest 46, *271* (decided on the repealed sects. 41, 73 of the Municipal Corporations Act, 1882) that sect. 71 of the Act of 1933 does not, in cases not covered by the present case, prevent proceedings being brought under sect. 84 in respect of acting as a member of a local authority when

disqualified under sect. 59 or not qualified under sect. 58. There may perhaps be a distinction between disqualification under sect. 59 and incapacity under sect. 58 : see the judgment of Lord Esher, M.R., in *De Souza* v. *Cobden* (*supra*).

The second point in this case involves reading the words " on which he so acted " in the proviso to sect. 84 (1) as meaning " on which he so first acted."

For Law as to Disqualifications, see HALSBURY, 1st Edn., Vol. 19, pp. 296, 297, para. 612, and pp. 303, 304, para 626, and Supp. ; and for the Cases, see DIGEST, Vol. 33, pp. 9-12, Nos. 8-30, and pp. 46, 47, Nos. 271-277. For the Local Government Act, 1933, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 26, sect. 59 on p. 334 and sect. 84 on p. 350.]

Action by Dunbar Frederick Watson Bishop, a local government elector of the borough of Newcastle-under-Lyme, claiming a declaration that Mrs. Fanny Rebecca Deakin had acted as a member of the borough council of Newcastle-under-Lyme while disqualified for being a member.

The facts and arguments appear in the judgment.

E. J. Rimmer for the plaintiff.

Dudley Collard for the defendant.

Clauson, J. : The object of this action is to obtain a declaration that the defendant, who is acting as an elected councillor of the borough council of Newcastle-under-Lyme, is now disqualified from so acting, and that her office as such councillor is vacant.

On July 6, 1932, the defendant was convicted of an offence and ordered to be imprisoned for a period exceeding three months, without the option of a fine. She has long since served that sentence ; but a period of five years has not yet elapsed from the date of that conviction. On Nov. 1, 1934, the defendant was elected to the office of councillor. There is no doubt that when so elected she was by law, by reason of the Local Government Act, 1933, s. 59 (1) (*e*) disqualified from election by reason of the conviction having taken place within five years before the day of election ; and there is no doubt that if within the due period prescribed by law an election petition had been presented against her on this ground, her office would have been declared vacant. However, that step was not taken ; and it is too late to question the validity of her election (see sect. 71 of the same Act).

After election, she acted as a councillor. The particular dates on which she so acted, which are stated in the statement of claim, were all within six months of the issue of the writ in this action ; but it was admitted before me by counsel that she began to act as councillor immediately after election on Nov. 1, 1934 ; and, accordingly, that she acted as a councillor on one or more dates more than six months prior to the issue of the writ.

It is said that she is in these circumstances, by reason of the Local Government Act, 1933, s. 59 (1) (*e*), disqualified for being a councillor, and the case is put in this way. It is said that, on the true construction of that section, any person who within five years before the day of his

election, has suffered such a conviction as in this case, is not only disqualified from being elected as a councillor, but if in fact he has been elected as a councillor, he is disqualified from acting as a councillor.

The relevant words in the section are as follows :

> A person shall be disqualified for being elected or being a member of a local authority if he has within five years before the day of election or since his election been convicted of any offence and ordered to be imprisoned for a period of not less than three months without the option of a fine.

The section provides for two matters : first, what is to be the disqualification for election ; and, secondly, what is to be disqualification for being a member after election ; and it provides for two disqualifications : first, conviction within five years before the day of election ; and, secondly, conviction since election It is obvious that the second disqualification mentioned does not fit the first case mentioned, namely, that of election, but does fit the second case, and the second case only. It is also obvious that the first disqualification mentioned fits the first case, and it does not seem at all apt to fit the second case. Indeed, if applied to the second case, the strangest results may follow. If the section is to be read as providing that a person is disqualified for being a councillor if he was convicted within five years before his election, it may well be that he is so disqualified when he acts as a councillor at a date later than five years from the date of the conviction. In that case, the effect of the disqualification operating would be that he would cease to be a councillor ; but he would be eligible at once for re-election to the vacant office, the five years having expired before the new election. I cannot think that the legislature intended such a whimsical result. All difficulty can be avoided by applying the well-known method of construction commonly known as *reddendo singula singulis*, and applying the first disqualification mentioned to the first case dealt with, and the second disqualification to the second case dealt with, a construction which, so far as I can see, infringes no rule of syntax or grammar. The result reached seems to be quite sensible, namely, that conviction within five years before the day of election, disqualifies from election, and conviction after election disqualifies from continuance in office.

However, I will assume that my view of the section is wrong, and that a person so elected a councillor who, after his election, acts as a councillor, is disqualified for being a councillor by reason of a conviction within five years before his election. Applying that to the present case, it would follow that when the defendant acted in November, 1934, as a councillor, she was disqualified. The point then arises whether this action, which was begun more than six months after she so acted, will lie. This question turns on the true meaning of the proviso to sect. 84 (1), which enacts that proceedings under sect. 84 (which is the section under

which this action is launched) on the ground of a person acting as a councillor when disqualified shall not be instituted after the expiration of six months from the date on which he so acted. It was suggested that the action will lie if within six months before the proceedings were instituted the defendant acted as councillor without qualification, notwithstanding that he first so acted more than six months before such institution.

In my view, this suggestion places a wrong construction on the section. The proviso is aimed at protecting a person who acts without qualification, if the proceeding is not brought within six months of his so acting; and the reference to the "date on which he so acted" seems to me necessarily to be a reference to the earliest date after election on which he so acts as the date at which "the period of limitation" begins to run.

As I am of opinion that the action fails on each of the two grounds I have mentioned, it becomes unnecessary for me to pursue several interesting questions under various sections of the relevant Acts which were raised and argued before me.

The action will be dismissed with costs.

Solicitors: *Lake & Son* (for the plaintiff); *W. H. Thompson* (for the defendant).

[*Reported by* Charles E. Eden, Esq., *Barrister-at-Law.*]

BROOKS WHARF AND BULL WHARF, LTD. *v.* GOODMAN BROS.

[King's Bench Division (Branson, J.), **February 7, 10, 1935.**]

Revenue—Bonded warehouse—Time when duty becomes due—Goods stolen from bonded warehouse—Liability of importer—Customs Consolidation Act, 1876, (*c.* 36). *ss.* 13, 85.

By an agreement between the plaintiffs, bonded warehousemen, and the defendants it was agreed that the defendants should pay to the plaintiffs certain wharf charges and that the plaintiffs should warehouse certain goods which the defendants were importing, undertaking in respect of them the usual obligations of bonded warehousemen. The goods were duly imported, customs duties becoming due. The goods were stolen before the duty had been paid. The plaintiffs paid the duty, pleading obligation to H.M. Customs and alternatively their obligations as bonded warehousemen, and sued for the sum paid. The defendants contended that the duty was paid as a personal liability of the plaintiffs as bonded warehousemen and counterclaimed for the value of the goods stolen, alleging negligence:—

Held: (i) duty becomes due on first entry, though it is not payable whilst the goods remain warehoused.

(ii) there was no evidence that the theft of the goods was due to negligence of the plaintiffs.

(iii) the extent of the duty of a warehouseman to search his premises for thieves before closing each night is governed by what is reasonable as a matter of business.

(iv) the defendants were liable to pay to the plaintiffs the amount paid in respect of the duty.

[EDITORIAL NOTE. This case depends upon the time at which customs duty becomes due when goods have been imported and placed in a bonded warehouse. The decision follows that in *A.-G.* v. *Ansted* (1844), 12 M. & W. 520, where it was held that the liability attaches to the importer upon the importation, although payment may be postponed. This is not affected by the Customs Consolidation Act, 1876, s. 13, which requires a warehouseman to give security for the payment of duties chargeable on any goods warehoused, and the liability imposed on the warehouseman by sect. 85 to pay the duty on any goods removed before the duty has been paid is merely a deterrent against collusion by the warehouseman to defraud the Revenue. Where the goods are removed without his knowledge and without negligence on his part, as was the case here, the warehouseman can properly recover the duty which he has had to pay in compliance with the statute. The case includes a valuable consideration by the learned Judge of what is a proper search of a bonded warehouse before closing for the night.

As to Liabilities of Warehousemen in Respect of Customs Duties, see HALSBURY, 1st Edn., Vol. 24, pp. 589, 590, paras. 1160, 1161; and for the Cases, see DIGEST, Vol. 39, pp 229, 230, Nos. 80-85.]

Cases referred to:

(1) *A.-G.* v. *Ansted* (1844), 12 M. & W. 520; 39 Digest 230, *85.*

(2) *Taylor* v. *Stray* (1857), 2 C.B:N.S. 175; 42 Digest 803, *118.*

Action to recover money paid for and on behalf of the defendants.

Plaintiffs, a firm of bonded warehousemen, and defendants in August, 1934, entered into an agreement, *inter alia*, that the defendants should pay to the plaintiffs as wharf charges, 1 per cent. of the value of certain goods which the defendants were importing, and that the plaintiffs should warehouse the goods and undertake in respect of them the usual obligations of a bonded warehouseman.

On August 11, 1934, the defendants imported 11 packages of squirrel linings of a value of £4,119 9*s.* 3*d.*, upon which customs duties of £823 17*s.* 10*d.* became due. Plaintiffs received these packages with the duty unpaid. On Sept. 8, 1934, the packages were stolen by thieves before any duty had been paid on their contents. On Feb. 13, 1935, plaintiffs paid the duty of £823 17*s.* 10*d.* to H.M. Customs and Excise, pleading obligation to H.M. Customs and alternatively pursuant to their obligations as bonded warehousemen undertaken in accordance with their agreement with defendants. Plaintiffs sued for (i) £823 17*s.* 10*d.*; (ii) £41 3*s.* 11*d.*, being 1 per cent. of the £4,119 9*s.* 3*d.* due under the agreement of August, 1934. Defendants pleaded that the £823 17*s.* 10*d.* paid was a personal liability of the plaintiffs as warehousemen under the Customs Consolidation Act, 1876, and counterclaimed for £4,119 9*s.* 3*d.*, alleging negligence by the plaintiffs.

H. U. Willink, *K.C.*, and *Eric Sachs* for the plaintiffs.

Sir Albion Richardson, *K.C.*, and *W. L. McNair* for the defendants.

Branson, J.: The plaintiffs base their claim for repayment of the £823 17*s.* 10*d.* duty upon the following grounds. They allege that the defendants having imported the goods in question became liable to the Crown to pay duty upon them, and they, the plaintiffs, having been

obliged to discharge the defendants' liablity owing to their having become wharfingers of defendants' goods are entitled to recover it as money paid at the implied request of the defendants. Or they say that the defendants, having requested them to take into their bonded warehouse dutiable goods upon which duty had not yet been paid with all the liabilities to the Crown which such an act involves, must indemnify them from the consequences which without any default on their part have come upon them by reason of their so doing.

The first way of stating the case rests upon the defendants being at all material times liable to the Crown for the duty. The defendants contend that the true view is that in the case of dutiable goods entered for warehousing the duty is a charge upon the goods and not upon any person at all, the liability to pay the duty only attaching to any one if the goods leave the warehouse otherwise than by being re-exported—and then attaching either to the person duly entering them for home consumption, whether the original importer or not, or if they leave the warehouse without having been duly entered, then upon the warehouseman.

This contention is contrary to the decision of the Court of Exchequer in *A.-G.* v. *Ansted* (1). It is true that in that case there was an additional reason for holding the defendants liable because they had in fact got the goods—but both Lord Abinger and Parke, B., expressly held that the liability to duty attached to the importer upon the importation of the goods though payment is postponed whilst the goods are in warehouse. It is not suggested that there has been any change in language in the Acts now in force to weaken or destroy the authority of *A.-G.* v. *Ansted* (1), and I consider myself bound by it. But, if I may respectfully say so, I also consider it correct. To hold otherwise would lead to at least one absurdity. Suppose in the present case that the stolen goods had been recovered by the defendants after the plaintiffs had paid the duty under the Customs Consolidation Act, 1876, s. 85, the defendants, if their contention is correct, would have been entitled to keep them duty free. In my view the language of sects. 82, 85 and 87, particularly the use of the expression "the duties due," supports the view that the duty becomes due on the first entry though it is not payable whilst the goods remain warehoused. The reasons behind sects. 82 and 85 are obvious—they prevent the possibility of loss of duty to the Crown owing to the goods being withdrawn from the warehouse without proper entry by collusion between the warehouseman and the importer of the goods, or by negligence on the part of the warehouseman. The next step in the plaintiffs' argument is really the same whether the defendants were themselves liable for the duty or not. They contend that their obligation to pay the duty arose because they complied with the request of the defendants to take the goods into their warehouse and so put themselves under the liability

to pay it if the goods should escape from their warehouse, and that they are therefore entitled to be indemnified by the defendants.

This proposition is sound in law—see, for example, *Taylor* v. *Stray* (2). The question is whether the plaintiffs can bring themselves within it as a matter of fact. To do so they must show that the loss of the goods was not due to any default of their own—otherwise the nexus is incomplete. This brings me to the story of how the goods came to be stolen. Some of it is necessarily surmise but some matters are certain. The plaintiffs' warehouse, being bonded, has to be locked up when work is done, and the Customs will not allow anyone to be inside it during the night. On the night in question it was properly locked up and a reasonably sufficient watch was kept outside it. I am satisfied that the goods were removed from the door into Broken Wharf between 7.5 and 7.30 a.m. on the Saturday morning, and that their removal was not rendered possible by any lack of efficiency in the outside watch. The traces left by the thieves indicate that the two men managed to secrete themselves in block Q and to remain there locked in during the Friday night. When all was quiet they broke the lock or hasp of two sets of double iron doors and removed the goods downstairs to the Broken Wharf entrance. That entrance was barred on the inside and locked on the outside, so that it required someone outside to break the padlock there and someone inside also to remove the bars. It follows that the thieves must have had accomplices outside, and no doubt these persons, knowing the times at which the outside lock was inspected, viz., 7 to 7.5 and again at 7.30, laid their plans to arrive between these times, break the lock and cart away the goods. Then comes the question, how did the thieves who were inside the warehouse manage to get left inside on the Friday night? The system adopted to prevent such an occurrence is the same in all the big warehouses in the City of London—persons who have goods in a warehouse must be given access to them and must be allowed to bring in other persons to inspect with a view to purchase or to sort, separate, pack or repack the goods. Orders to admit the owners are issued, and they can, and do, bring with them their prospective purchasers—such a party is admitted by a servant of the warehouseman and taken to the locked door of the particular portion of the warehouse required. There the party is handed over to the keeper of that portion of the warehouse who has foremen and labourers available to attend it whilst it conducts its operations, and whose duty it is to see that the whole party is shepherded out when its operations are completed. Several such parties may be in the warehouse at once. The chance that one or more of the persons comprising one of these parties may manage to evade this shepherding and hide is obvious and is recognised, and to provide against it a search is made of the whole of the premises before they are locked up for the night. The plaintiffs' evidence was that their men go through all parts

of the warehouse to see if anyone is there before locking up—but that in a warehouse with furs hanging from walls and piled in heaps on the floors and with bales opened and unopened all about the place it would be impossible without employing an army of men to make such a search as would guarantee that no one was concealed in the warehouse. The defendants called one witness, Mr. Dranger, who spoke as to the practice of his own firm and said they make a perfect and thorough search every night if it takes a dozen men an hour to do it. He also said that his firm so stacked their goods that no one could hide behind or on top of the bales. Upon this evidence I am asked by the defendants to hold that the plaintiffs were negligent in allowing the thieves to remain secreted. There is no doubt that given sufficient men and time such a search could be made every night as to make it impossible for anyone to lie hidden in a warehouse, however full of goods. But the duty of a warehouseman in this respect must be governed by what is reasonable as a matter of business. The plaintiffs have been in business a great many years and there is no evidence that the search which they made has ever before been found to be insufficient, or that anyone has previously succeeded in evading the precautions taken by them to see that everyone is out of the building before it is locked up. How exactly the two thieves, who were undoubtedly dressed in the white coats affected by those who deal in furs, and were undoubtedly part of a gang of clever rascals, managed to escape the vigilance of the plaintiffs' servants cannot of course be explained; but, unless I were prepared to hold on the mere ground that they did so escape that the plaintiffs were negligent, there is no evidence before me that the plaintiffs omitted any reasonable precaution. I cannot regard this as a case of *res ipsa loquitur*, and I find that the loss of the furs was not due to any negligence on the part of the plaintiffs, who exercised all reasonable care in the custody of the goods in question. The result is that the plaintiffs succeed both on the claim and on the counterclaim—without it being necessary for them to rely upon the London Wharfingers Clause as a defence to the counterclaim. This being so, it is not material to express an opinion as to the effect of that clause upon the plaintiffs' liability as warehousemen. I think it right to say, however, that I have the gravest doubt as to its applicability to that liability.

Solicitors: *Keene, Marsland & Co.* (for the plaintiffs); *Hair & Co.* (for the defendants).

[*Reported by* Frank Rowe, Esq. *Barrister-at-Law.*]

INTEROVEN STOVE CO., LTD., *v.* F. W. H. HIBBARD AND P. F. PAINTER (Trading as ODELL, HIBBARD & CO) AND SIR H. PERCY SHEPHERD.

[KING'S BENCH DIVISION (Hilbery, J.), **February 7, 1936.**]

Distress—Illegal distress—Substantial damages—Law of Distress Amendment Act, 1908 (*c.* 53), *ss.* 1 (*c*), 2, 4 (2) (*b*).

The plaintiffs had an agreement with certain manufacturers to have the goods purchased from them, stored at the manufacturers' premises until such time as they might take delivery. The goods were not stored continuously in the same room, but the room was changed from time to time to suit the convenience of the defendants. Invoices were sent in respect of this storage from time to time and the word "rent" was used. The second-named defendant was landlord of these premises and authorised the defendant company to enter the premises and levy a distress upon all the goods thereon, including the goods belonging to the plaintiffs. The plaintiffs then served upon defendants the usual notice under the Law of Distress Amendment Act, 1908, but the defendants proceeded with the distress. The plaintiffs then took out a summons under the Law of Distress Amendment Act, 1908, s. 2, and the defendants were ordered by the magistrate to return the goods to the plaintiffs, which, under certain conditions pending the hearing of a case stated, they did. The plaintiffs then brought this action for trespass and illegal distress claiming substantial damages :—

HELD : (i) upon the facts the plaintiffs had no exclusive use of any part of the defendant company's premises and were not tenants or undertenants thereof.

(ii) the distress was illegal.

(iii) though no actual damage was proved the plaintiffs were entitled to substantial damages.

[**EDITORIAL NOTE.** The main point in this case is whether in an action for illegal distress substantial damages can be awarded without proof of any actual damage. The plaintiffs were not deprived of the possession of the goods at any time when they really required it, and though they were put to considerable inconvenience in contesting the position legally, they did not, so far as the goods were concerned, sustain any pecuniary loss. The point raised has not been contested since 1830, and then only in a case of excessive distress, and HILBERY, J., has followed the decision then taken. There is an interesting point as to what amounts to a tenancy ; but the question on estoppel that arose was not decided, it being unnecessary to decide it in the circumstances. The magistrate having ordered the return of the goods under the Law of Distress Amendment Act, 1908, s. 2, it is indeed questionable whether a defendant can again dispute in a civil action whether there has been an illegal distress.

AS TO DAMAGES FOR ILLEGAL DISTRESS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 541, 542, para. 759, and FOR THE CASES, see DIGEST, Vol. 18, pp. 387, 388, Nos. 1274-1281.]

Cases referred to :

(1) *Bayliss* v. *Fisher* (1830), 7 Bing. 153 ; 18 Digest 392, *1337*.

(2) *Owen & Smith* v. *Reo Motors (Britain), Ltd.* (1934), 151 L.T. 274 ; Digest Supp.

(3) *Brewer* v. *Dew* (1843), 11 M. & W. 625 ; 5 Digest 972, *7963*.

(4) *The Mediana*, [1900] A.C. 113 ; 17 Digest 79, *9*.

(5) *Harvey* v. *Pocock* (1843) 11 M. & W. 740 ; 18 Digest 368, *1090.*
(6) *Canadian Pacific Wine Co.* v. *Tuley*, [1921] 2 A.C. 417 ; 43 Digest 395, *176*
(7) *Lucena* v. *Craufurd* (1806), 2 Bos. & P.N.R. 269 ; 29 Digest 97, *555.*
(8) *Keen* v. *Priest* (1859), 4 H. & N. 236 ; 18 Digest 299, *356.*
(9) *Hogarth* v. *Jennings*, [1892] 1 Q.B. 907 ; 18 Digest 277, *140.*
(10) *Routledge* v. *Hislop* (1860), 2 E. & E. 549 ; 13 Digest 505, *560.*
(11) *Duchess of Kingston's Case* (1776), 1 East P.C. 468 ; 21 Digest 159, *213.*
(12) *Lowe* v. *Dorling and Son*, [1906] 2 K.B. 772 ; 18 Digest 308, *435.*
(13) *Smith* v. *Enright* (1893), 63 L.J. Q.B. ; 220 ; 18 Digest 384, *1241.*
(14) *Gibbs* v. *Cruikshank* (1873), L.R. 8 C.P. 454 ; 18 Digest 282, *175.*

Action for damages for trespass to and conversion, detention and illegal distress of the goods of the plaintiff company. The plaintiff company further contended that by virtue of the magistrate's decision, upon an application under the Law of Distress Amendment Act, 1908, s. 2, the defendants were estopped from denying that there had been an illegal distress. The plaintiff company asked for punitive damages.

The defendants pleaded (1) that the goods were not the property of the plaintiff company ; (2) that the plaintiff company were undertenants of the premises on which the goods were stored and thereby precluded by virtue of the Law of Distress Amendment Act, 1908, s. 5, from any remedy for distress ; and/or (3) that the plaintiff company had an insurable interest in the defendants' business and thereby precluded by virtue of the Law of Distress Amendment Act, 1908, s. 4 (2) (*b*) from any remedy for distress ; and/or (4) that the plaintiff company had a beneficial interest in the defendants' business and thereby precluded by virtue of the Law of Distress Amendment Act, 1908, s. 1 (*c*), from any remedy for distress ; and (5) that the defendants were not estopped from denying the illegal distress by reason of the magistrates' findings.

H. J. Wallington, *K.C.*, and *Edward Terrell* for the defendants.

The plaintiff company were undertenants, and being such would have no remedy under the Law of Distress Amendment Act, 1908, s. 5, because any undertenancy which could exist in this case was without licence from the landlord, and the lease to which the premises were subject required that an undertenancy should be created by licence. Alternatively, the plaintiff company had a beneficial interest in the premises by virtue of agreements between the plaintiff company and the defendants, whereby the defendants obtained the manufacturing profits and the plaintiff company the selling profits of the goods in question. The goods did not belong to the plaintiff company. No property had passed and no payment had been made for these specific goods ; and there had been no appropriation of the goods to the contract. The plaintiff company had an insurable interest in the continuance of the defendants' business (*Lucena* v. *Craufurd* (7)).

The present matter is not *res judicata* ; because (*a*) the Act (Law of Distress Amendment Act, 1908) gives two remedies. Sect. 2 giving a

right to apply to the justices, and leaving the landlord liable to an action at law as well, (*b*) the issue before the bench was not whether the defendants should pay damages for illegal distress, but whether the applicants were entitled to the protection of the Act and obtain the return of the goods. The present issue is quite different. This action is for damages for conversion, detinue and distress.

The damages should not be punitive damages. It is the right and duty of distressors to break open inner doors. The breaking open of certain packages, if done for the purpose of identifying the goods with those named in a catalogue is not an aggravation of damages. It is not an aggravation of damages merely because the defendants did not enquire whether the goods belonged to the plaintiff company: *Bayliss* v. *Fisher* (1). The damages claimable are only nominal: *Keen* v. *Priest* (8), *Hogarth* v. *Jennings* (9).

C. Gallop, for the plaintiffs.

As to *res judicata*: Once questions of fact and law are determined *inter partes* and *privies*, there is an end of the matter: *Routledge* v. *Hislop* (10), *Duchess of Kingston's Case* (11) The Law of Distress Amendment Act, 1908, does not make any difference to the law of *res judicata*: *Lowe* v. *Dorling & Son* (12). The damages for the trespass must be substantial: *Smith* v. *Enright* (13), *Gibbs* v. *Cruikshank* (14).

HILBERY, J.: By two agreements, the first made with Hayward and Laytona Exports, and the second made with Hayward and Laytona Heaters on July 6, 1933, the plaintiff company had full and exclusive licence and authority to manufacture, use and vend water and air radiators. By a third agreement of the same date the plaintiff company appointed Laytona Heaters sole suppliers to them of water radiators and Laytona Exports sole air radiator suppliers. The plaintiff company undertook by clause 4 of the manufacturing agreement to take a weekly delivery of twenty-four water radiators and twelve air radiators, and agreed to take a minimum delivery by Oct. 1933. By clause 5 the plaintiff company agreed to make monthly payments for the goods. Thereafter the two companies, Laytona Exports and Laytona Heaters were to be found carrying on the manufacturing business at Kimberly Works, Willesden, where the distress was levied. Hayward was a shareholder in Laytona Heaters and had qualifying shares in Laytona Exports.

I accept the plaintiff company's witnesses' evidence that in Feb., 1934, the plaintiff company paid £3,000 on account of goods to be manufactured for them by the two Laytona companies. As the invoices for the goods were received so the amount of advance payment was treated as satisfied. As to the goods receivable against the £3,000 the plaintiff company made settled payments. Delivery of the goods was first made at the plaintiff company's warehouse, but difficulty was experienced and the

goods were later stored at the Laytona companies' works in whatever rooms were suitable. Delivery was also made to these rooms. The plaintiff company had no say in the selection of the rooms. At first, 5*s*., then 10*s*. per week was paid by the plaintiff company for the rooms. Thereafter a wooden painted notice board was put up on the rooms by the plaintiff company. This was not intended by the plaintiff company to indicate that the goods were the property of the plaintiff company, but to prevent the goods being in the reputed ownership of the Laytona companies. The plaintiff company never stipulated for or had exclusive possession of the rooms. There were sometimes as many Laytona companies goods in the rooms as there were goods belonging to the plaintiff company.

The plaintiff company sent their own storekeeper in Sept., 1935, to take delivery of the goods at the Laytona works and provided him with a key. Sometimes three rooms were used for storage, sometimes two. The Laytona companies had the keys of the room. The plaintiff company, however, never had a key of the outer doors. The course of business was for radiators to be delivered, packed ready for disposal and for the manufacturers to label goods with the plaintiff company's name. The manufacturers changed the rooms from time to time. In Oct., 1934, Laytona Heaters went into liquidation and Laytona Exports continued to manufacture.

The premises at Kimberly works were subject to a lease of twenty-one years at a yearly rental of £350 granted by the father of the second named defendant, Sir Percy Shepherd, of which the reversion vested at all material times in the second named defendant. Sir Percy Shepherd granted licences to assign to Hayward's Limited and they assigned to one Hayward. There is no other evidence put to convince me that Hayward as an individual became the assignee or tenant in substitution to Hayward's Limited. The distress warrant was signed by Sir Percy Shepherd and is not consistent with this assertion for it was stated therein that arrears of rent were due from Hayward's Automobiles Limited. I am not satisfied that Hayward was the tenant.

On Mar. 26, on the authority of the distress warrant, the defendants, F. W. M. Hibbard and P. F. Painter, trading as Odell Hibbard & Co., entered the premises and levied distress on all the goods on the premises. The goods enumerated in para. 1 of the statement of claim were in the two rooms. The bailiff passed the open door of the storeroom and looked in. The plaintiff company's storekeeper locked the inner doors and left the premises. The next day the storekeeper opened and locked the doors in the presence of the bailiff and gave to the bailiff the telephone number of the plaintiff company.

On Mar. 28 the plaintiff company's solicitors served on the defendants notice in conformity with the Law of Distress Amendment Act, 1908,

declaring the goods the property of the plaintiff company, and stating that the plaintiff company were not tenants of nor had a beneficial interest in the premises. On Apr. 2, the rooms were broken open on the authority of the second named defendant so that the auctioneers could catalogue the goods. Neither the first or second named defendants took steps to find out if the claim of the plaintiff company was well founded. Sir Percy Shepherd said that the plaintiff company could have the goods on the payment of rent. He wrote to the plaintiff company on Apr. 2, 1935, that the goods on the premises were there without the licence of the superior landlord and without payment of rent, and were therefore being distrained. This has never been defended as a possible ground for the seizure.

The first named defendant, with the authority of the second named defendant broke open some packages and began marking goods with lot numbers. On Apr. 5, the plaintiff company's solicitors wrote to the first named defendants pointing out the breaking open of the packages and the marking of the goods, and mentioned their remedy under the Law of Distress Amendment Act, 1908. I find that the allegations regarding the breaking open of the packages are true. The attitude of the first named defendants was that they completely disregarded the claim and declaration filed by the plaintiff company, and intended going on to sell the goods unless a court of law stopped them.

The plaintiff company applied to the justices for a summons under the Law of Distress Amendment Act, 1908, s. 2. The summons was granted. The plaintiff company gave notice of this fact to the defendants and the proposed sale on Apr. 12 was postponed. The summons was heard on May 2, 9 and 14, and the magistrates decided that there had been an illegal distress and ordered the return of the goods. The defendants were not prepared to relinquish the goods and a deposit of money was made to the defendants by the plaintiff company, pending the hearing of a special case.

On Aug. 1 the plaintiff company issued a writ claiming damages for illegal distress and conversion, an order for delivery and damages for detention. Before me the plaintiff company made without exposition an amendment to the statement of claim so that the claim was that the defendants seized and carried away the plaintiff company's goods adding the claim of conversion, detinue, trespass and illegal distress. The plaintiff company delivered a reply setting out the alleged estoppel by way of answer to the defendants' pleas in the action. The first defence raised was that the goods in question were not the property in law of the plaintiff company. I find that the property in the goods had passed to the plaintiff company. They were goods under a contract for the sale of future goods to be manufactured and delivered by the Laytona companies of a description which the Laytona companies had to manu-

facture. In a deliverable state they had been unconditionally appropriated to the contract by the manufacturers marked with the plaintiff company's name with full assent of the plaintiff company, actually delivered to them, and received by Mr. Harris as agent to take delivery of the goods manufactured against the contracts with the Laytona companies. In the circumstances I have no hesitation in saying that the property in the goods had passed to the plaintiff company.

The next contention raised by the defendants was that the plaintiff company, even if the goods were theirs, were prevented from having the benefits of the Law of Distress Amendment Act, 1908, because they were, on the facts of the case, undertenants of the rooms and excluded from the operation of the Act by sect. 5 thereof.

The defendants asserted in the first place, that the facts amounted to the granting to the plaintiff company of an undertenancy; that the undertenancy had been created in breach of the covenant in the lease, without the consent of the landlord; that the landlord had given no consent or licence. Laytona Heaters gave facilities to the plaintiff company for the delivery of the goods at the works at Kimberly Road. That being the purpose, I am satisfied there was no intention to create a tenancy, that there was no granting of exclusive occupation, nor exclusive occupation of any portion of the premises. The rooms were changed from time to time as suited the convenience of the defendants. There was no undertenancy ever created, and the plaintiff company never were undertenants of any part of the premises. It is true that invoices were sent for ten shillings a week and the word "rent" was used, but mere use of the word "rent" could not carry the defendants anywhere.

The next contention is based upon the same premise as that of undertenancy. The Law of Distress Amendment Act, 1908, s. 4 (2) (*b*) provides that the Act shall not apply

> to goods (not being goods of a lodger) upon premises where any trade or business is carried on in which both the immediate tenant and the undertenant have an interest.

It would be sufficient to say that my conclusion in fact, that there was no undertenancy ever created, would be sufficient to answer this contention. But I am satisfied in addition that the business relation between the parties was such that it could not be said that as between the plaintiff company and the Laytona companies, had they been the immediate tenants, the plaintiff company had an interest in the business carried on. The trade or business carried on was that of manufacturing. Laytona Exports was an independent legal entity. In no sense was it the same as that of the plaintiff company. There is no evidence that the plaintiff company had even a holding of shares or the least interest in the business in any true sense of the word. They were no more than customers of the Laytona company, in the ordinary position of customers who pay for what is manufactured.

The defendants say that if the Laytona company was not the immediate tenant, Hayward, the plaintiff company's representative, was the immediate tenant. If so, he carried on no business. I am not satisfied that the plaintiff company was a tenant, though, I think, perhaps Hayward's Automobile Ltd. may have been the tenants. This subsection is in no way applicable to the facts of this case.

The next contention of the defendants is this; that if the plaintiff company were not undertenants then the defendants could claim under the Law of Distress Amendment Act, 1908, s. 1 (*c*) that the plaintiff company were barred from relief because such persons must not have any beneficial interest. The defendants contended that the business relationship between the Laytona company and Hayward was such that the plaintiff company had a beneficial interest in the business because they were in the circumstances in a joint adventure and that both the plaintiff company and the defendants were dependent upon the continuance of the lease for the carrying out of the adventure.

This appears to me to be as ill-founded as the other contentions. The only position that the plaintiff company held was that of customers. There is nothing to suggest that the plaintiff company had any joint adventure. If Hayward was not a tenant, then the assignee may have been Hayward's Automobile Ltd., but so far as I know the plaintiff company never had any relationship with Hayward's Automobile Ltd.

All these contentions are without the least foundation. The result is that I now pass to the question of damage. I need not decide the question of the alleged estoppel as I have decided that all the pleas of the defendants are bad.

The plaintiff company contend here that, under Law of Distress Amendment Act, 1908, s. 2, they are entitled to damages as for trespass and illegal distress and damages for detention. On my findings there was an illegal distress, and at any rate from and after the service of the inventory and declaration signed by the plaintiff company in accordance with the provisions of the Act, the distress was illegal and there was trespass to the goods of the plaintiff company

The plaintiff company say that although no actual damage resulted from the trespass and detention, they are entitled to damages which are a consequence of the trespass and of the tort, including the costs of consultation fees between solicitor and client incurred before action taken before the magistrates. I do not think that these costs are recoverable damages in this action. The costs incurred in the suit ordinarily and rightly brought for a remedy for a tortious act are not given by way of damages, but on a theory of indemnity and only as indemnity. They are limited, therefore, to party and party costs and therefore begin with the beginning of the suit, that is with the letter before action. There are always general solicitor and clients' costs incurred before the

suit begins. They are not the result of the tortious act. They are outside the costs in respect of which the indemnity is granted. They are not costs arising out of the tort. They arise out of a practical and not a legal necessity for a person to be advised before bringing an action at law.

The landlord here had a right to distrain for rent in arrear. The distress was legal, but after the service of the declaration and inventory under the Law of Distress Amendment Act, 1908, s. 2, the proceeding of distress became illegal. The distress then became a trespass to the plaintiff company's goods. An illegal distress has always been a trespass and an action would always lie. (See note to *Trespass to Goods*, 1868, Bullen & Leake, page 114.) And where there is a trespass to goods, though no actual damage results, the law gives a right to recover damages not limited to actual damage sustained, but a right to recover substantial damages even though there be no proof of actual loss. The case of *Bayliss* v. *Fisher* (1) was cited and is an authority for that proposition. More recently the law has been alluded to and stated in the Court of Appeal in the case of *Owen & Smith* v. *Reo Motors (Britain) Ltd.* (2), which was an action for damages for trespass to goods. There Greer, L.J., says at page 278 :

> Now what damage have the dealers suffered by reason of the fact that these vehicles were removed without the opportunity being given which was provided for in the contract ? I think, practically speaking, there was no damage. If they had been given the opportunity, there would still have been a loss of reputation to the dealers in their business. It does not follow that if the opportunity had been given the bodies would have been removed. It would only have meant their having a reasonable time in which to remove all the cabs and bodies which were theirs. The creditor looking out from the opposite side of the street would have seen just as much, if the contract had been strictly carried out, as he did, in fact, see. No authority has been cited to show that punitive damages could be recovered for trespass to chattels. I prefer not to express an opinion on that somewhat difficult matter, but I do think that in this case there must be something in the nature of substantial damages.

I am satisfied, therefore, that though no actual damage is proved, the court is entitled to give, if the circumstances justify it, substantial damages.

I have stated what the attitude of the defendants was in this matter.

The plaintiff company were treated in a very high-handed manner ; there is nothing to be said against them ; they were a respectable business company. I was particularly impressed with the candour and perfect moderation of Mr. Stringer's evidence and the reliability of the plaintiff company's evidence as a whole. The defendants attitude to them was " you may be perfectly right ; these may be your goods, but we shall go straight on and sell them without enquiry unless you choose to do one of two things, either pay us a very large sum of rent or go to the court and get us stopped."

I cannot believe that where the Legislature has said that a person quite independent who falls within the privileges of the Law of Distress Amendment Act, 1908, and is to deliver an inventory and declaration will not have protection where the defendant levies a distress in disregard of the provisions of the Act.

The stoppage of delivery on Mar. 26, at the height of the radiator season was a very serious time to stop delivery of heaters. The defendants ought to pay a substantial sum for the illegal distress and trespass.

Judgment for the plaintiff company for £100 for damages for illegal distress and trespass, that sum to include damage for detention.

Solicitors: *Bennett, Ferris & Bennett* (for the plaintiffs); *Warden Gowling* (for the defendants).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

CHICHESTER *v.* CHICHESTER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.), **February 12, 1936.**]

Husband and wife—Divorce—Petitions for variation of settlement and maintenance—Proportion between amount secured and amount ordered to be paid—Deductions allowable in assessing maintenance—Covenant for benefit of children of former marriage—Supreme Court of Judicature (Consolidation) Act, 1925, (*c.* 49), *s.* 190 (1), (2).

The Registrar, in his report on a petition for maintenance by a wife, submitted that the respondent should pay maintenance during the joint lives of the petitioner and the respondent at the rate of £272 a year, of which £200 a year should be secured. In arriving at this figure the Registrar took into account, *inter alia*, a deed of covenant for the benefit of the respondent's children by a former marriage. The respondent contended that not more than one third or a half of the amount awarded as maintenance should be secured.

HELD: (i) the Court must decide first under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (1) whether any and if so what sum shall be secured, and whether that sum shall be a gross or an annual sum and for how long the same shall be secured. Then the Court must consider under sect. 190 (2) what monthly or weekly sum in substitution for or in addition to the secured sum should be paid as maintenance. There is no rigid rule limiting the amount secured to between one third and one half of the amount awarded as maintenance.

(ii) The deed of covenant for the benefit of the children was properly taken into account in considering the husband's ability.

[**EDITORIAL NOTE.** This case emphasises the fact that whatever may be the general practice there is no rigid rule as to the proportion that an order to secure should bear to an order to pay maintenance. The two points are dealt with under separate subsections of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190. Under subsect. (1) the Court may order the husband to secure to the wife "such gross sum of money or annual sum of money for any term, not exceeding

her life." Under subsect. (2) the Court may "either in addition to or instead of" an order under subsect. (1) "direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the Court may think reasonable." The two orders are thus seen to be quite distinct and independent, the former being the security of a gross or annual sum limited to the period of the wife's life, and the latter a payment of a monthly or weekly sum limited to the period of the joint lives. In practice the proportion of the sum secured is one third or one half of the sum payable as maintenance, but here the Court taking into account the fact that the husband's income was derived from a settled estate and was already seriously diminished by other liabilities, ordered a much higher proportion to be secured.

As to Permanent Maintenance, see HALSBURY, Hailsham Edn., Vol. 10, pp. 785-795, paras., 1244-1262, and for the Cases, see DIGEST, Vol. 27, pp. 502-510].

Cross-Motions to vary the Registrar's report on petitions for variation of settlement and for permanent maintenance, which raised, *inter alia*, the question of the proportion that the order to secure should bear to the order to pay permanent maintenance.

The facts and arguments and submissions contained in the Registrar's report appear from the judgment.

Alexander Grant, K.C., and *R. Bush James* for the petitioner.

F. R. Evershed, K.C., and *H. W. Barnard* for the respondent.

R. W. Goff for the trustees.

Sir Boyd Merriman, P.: This is a motion and cross-motion to vary the Registrar's report. Both parties are challenging the report in certain respects. The report deals both with variation of marriage settlements and with maintenance. My only criticism of the report is that, if anything, it adopts somewhat too rigid a line about what were supposed to be principles in connection with variation of settlements and the granting of maintenance.

[His Lordship here dealt with the necessary variation of the settlements.]

But now I come to the really difficult question of maintenance. With regard to that, in the main I think the result at which the Registrar has arrived satisfies me as being a thoroughly just result; but I do want to say a word about the arguments which were addressed to him, and to some extent given effect to by him, and which in turn have been addressed to me. This matter has been approached, in Mr. Grant's argument, as if the proper method of settling this question were to start with some sum which the wife is entitled to. He does not say she is absolutely entitled to one third of the joint income, but, admitting that there is a certain discretion in the amount, he starts with the argument that you have got to find what the proportion is, and, having found what the proportion is, then find how much of that is to be secured. Then, on the other hand, Mr. Evershed says, following the phrase in the Registrar's report, that, having discovered what the proportion is and that some of

it is to be secured, you should not order more than one third or one half of the estate to be secured. I wish to say again, as has been said so often by one or other of us, that I decline to recognise the existence of any rigid rule in maintenance as to the proportion to be given to the wife, and, speaking for myself, I decline to recognise that you first of all have got to settle the proportion and then, having settled the proportion, to say how much of it should be secured. If there is any principle in this matter, it is this, that, whatever the old Ecclesiastical proceedings with regard to alimony and maintenance may have been—and I must not be thought to be excluding alimony to maintenance at any rate so far as our present jurisdiction is concerned—it is based upon the statute of 1925, reproducing, of course, earlier Matrimonial Causes Acts. I think the only principle to be observed is that one should follow the statute. The statute is this : " On any decree for divorce or nullity "—I am not reading all the words—" the court may secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband "—that means his ability to pay, of course—" and to the conduct of the parties, the court may deem to be reasonable." That is the first thing we are directed to do, or directed that we may do. The other is this : that in divorce or nullity " the court may, if it thinks fit, by order, either in addition to or instead of an order under subsect. (1) "—that is an order for security—" direct the husband to pay to the wife during the joint lives of the husband and the wife such monthly or weekly sum for her maintenance and support as the court may think reasonable." It is perfectly obvious, therefore, so it seems to me, that there is no such thing as deciding first what the proportion is and then how much of that shall be secured. What one has to decide on the whole matter, having regard to the considerations which the statute directs one to take into account, is whether there shall be any security at all, and, if so, whether it shall be a gross sum of money or an annual sum of money, and for what term, or whether there shall be nothing at all secured, and then, whether one orders security or not, order in substitution for security or in addition to security what reasonable sum shall be paid. One has got to take all the circumstances of the case into account and arrive at a proper solution having regard to the factors which are mentioned in the statute.

Mr. Grant says that in arriving at the original proportion—and this again, to some extent, is matter for criticism in the report—certain things as matter of law must be included, and certain things as matter of law must be excluded, in arriving at the figures upon which the ultimate result is arrived at, and controversy has turned upon some three or four of eight items which the husband is liable to pay. I am not going to use such words as " charges upon income," or anything of that sort. On the one side it has been argued that as a matter of law too little has been

taken into account and too small a deduction has been made, and on the other side, that too large a deduction has been made before seeing what is the husband's ability to pay.

The first of these is £400 a year, which he was liable to pay, under a covenant by deed, to the children of a former marriage. I may add that in the case of this particular husband, there have been two marriages before the one with which I am dealing. The details do not matter, but there is a covenant by which to a former wife, who divorced him, he has to pay £200 and £400 to the children. Nobody has disputed that the £200 to the wife has to be taken into account, but it has been argued as a matter of law that the £400 cannot be taken into account by this process of reasoning. It is stated in various passages in Rayden that maintenance is dealt with, not indeed on the same principle—because that phrase is not used—but on similar grounds to alimony, and when you look at alimony you are referred back to the principles stated with regard to alimony *pendente lite*. With regard to alimony *pendente lite*, there are two quite old cases which say that, as matter of general rule and in the absence of express circumstances, in settling the amount of alimony *pendente lite* you ought not to take into account the husband's liability to maintain the children of his former wife. Therefore, Mr. Grant says, it follows as a matter of law that a deed of covenant for the benefit of children of a former marriage cannot be taken into account in settling what should be the maintenance. I profoundly disagree with that argument, and I decline absolutely to be fettered in any such way. When Lady Chichester, the wife in the present suit, married Sir Edward Chichester, he was, in fact,under that liability by covenant both to his wife and to his children. I am not going to say why that must as a matter of law be deducted in arriving at this calculation. What I say is that it is quite plainly a circumstance which is to be taken into account, in the words of the statute, in considering the husband's ability, and I think ultimately all concerned in the argument agreed, in substance, that that is what it came to.

Similarly with regard to the next item, which both counsel in turn challenged—the one as too large and the other as too small—it appears that some sum, which nobody has been able precisely to qualify, but a sum which is somewhere between £450 and £470, or thereabouts, is payable by the husband in respect, first of all, of a policy of insurance to secure a loan which now amounts to £2,750, with interest on the said loan, and the annual payment of £200 a year by which he has agreed to reduce the loan. This particular item, or group of items, seems to me to illustrate perfectly the undesirability of any attempt to fetter the court in arriving at a proper figure for the wife's maintenance, because neither party has been able to suggest any principle by which any specific figure should be arrived at.

The Registrar has arrived at a figure, taking all the circumstances into account, the various items of which this sum is composed, and the fact that the charge will diminish year by year, though not very much, which he thinks is a fair sum. He has taken £150 a year as a sort of figure which ought to be taken into account under the statutory directions as diminishing the husband's ability to pay and representing his past matrimonial conduct. I have listened to the arguments on the one side and the other to show why that sum should be diminished or increased. None of those arguments have satisfied me. I think the Registrar has arrived, if I may say so, at an extremely sensible view of the proper effect to be given to the circumstances represented by that figure.

Those are the main items on the one side and on the other. The result of what I have said is that, in my opinion, as an amount, having regard to the wife's fortune, the husband's ability to pay, the conduct of the parties, and as a matter of reasonableness taking all the factors into account, the Registrar has arrived at what I think is a very just figure, £272 for the wife.

But there is one other circumstance which I think has to be taken into account in arriving at that figure. As against these charges there is the circumstance that he has thought it right, under the first subsection, to settle £200 a year. Now I think it is a most material circumstance, in testing whether the total amount, in meal or malt, which the wife is getting is or is not reasonable and does or does not comply with all the considerations set out in the statute, to consider the advantages that she gets from the settlement of the part which is secured. As I have already said, the security may be by gross sum, or it may be by an annual sum, and it may be for any term not exceeding her life. There is no question here of settling a gross sum, but the husband, in the main, so far as this part of the case is concerned, derives his income from a life tenancy of a particular estate. Therefore the Registrar has said: "I am going to limit the security to their joint lives." Nobody disputes the propriety of that. He has provided that the term is to be for their joint lives. She therefore does not get, it is true, in this case, the advantage of a wife who gets a security for her life and a survival of the maintenance thus secured after the death of the husband, but at any rate she does get this advantage, which is a considerable one, that the amount which is ordered to be secured is not subject to fluctuation. It cannot be varied up or down as to amount in any change of circumstances; it is fixed at all events. That, I think, is a very important factor, and in considering the propriety of the sum of £272 at which the Registrar has arrived, I have taken into account, and I think there ought to be taken into account, the fact that a considerable proportion of it has been ordered to be secured.

Now with regard to that proportion, an argument has been addressed to me that the amount ought not, according to some supposed principle,

to exceed a third or a half. I do not agree with that in the least. This is a case in which the husband derives his income from a settled estate, and the matrimonial history shows that his income has been diminishing in alarming proportions, having regard to liabilities which he has created —I will not say entirely by his own fault, or anything of that kind, but which in fact he has created. I think this is eminently a case in which a very considerable proportion of the wife's maintenance should be secured to her under the first subsection, and I entirely agree with the figure at which the Registrar has arrived ; that is, that £200 of it should be secured. It is upon the basis that I think that that is a fair and proper thing that I am satisfied that the whole figure of £272, in the circumstances of the case, is a fair one for the wife.

Now there only remains one other matter, and that is the sum in respect of the boy. I am very anxious not to do anything here which might even seem remotely to impinge upon the jurisdiction of the Chancery Division, in whose care this boy is as a ward of court, but the Registrar has included a sum of £40 to be payable to the wife for the purpose simply of looking after the boy and reimbursing herself for the boy's expenses, including, amongst other things, his railway fares—because that is not covered at present by anything which is done in the Chancery Division—during that part of the holidays, which is agreed to be half of the school holidays, during which he resides with her. She is only allowed £40 for that, and I think that amount is rather too small, now that I know that the husband's undertaking to the Chancery Division is limited to school bills, clothing, and that sort of thing, and it does not cover the cost of getting him to and from school, and so on. It must be to some extent an estimate, but I think that amount should be increased by some £18, making it £58 altogether. In that I have made a rough guess as to railway fares, and I have also taken into account that, as things are at present, she does not, I think, get anything like £1 a day for the time he is with her. After all, the whole essence of this is that she should be able to give the boy, during the part of the school holidays for which she is responsible, something like the sort of life that he was accustomed to when the home was still going. I think that amount should be increased to £58, but as far as the amount is concerned, for the rest I confirm the Registrar's report and I grant the cross-motion to the extent I have indicated with regard to the variation of the settlement.

His Lordship, after hearing argument, directed that the wife should have the ordinary costs of a motion with counsel and that the costs of the trustees should be paid by the respondent as provided by the Registrar.

Solicitors : *Withers & Co.* (for the petitioner) ; *Gordon, Dadds & Co.* (for the respondent) ; *Peake & Co.* (for the trustees).

[*Reported by* J. F. Compton-Miller, Esq., *Barrister-at-Law.*]

Re HOOPER, HOOPER *v.* CARPENTER.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.), **February 19, 1936.**]

***Will**—Construction—"Heir-at-law"—Construction in popular sense.*

Testator by his will which he made in 1901 directed that his estate should be held, subject to a prior life interest therein for the benefit of his mother, upon trust for his wife and after her death "upon trust for such person or persons as at the decease of my said wife shall be my heir or heirs at law absolutely." Testator died in 1934, his mother having died in 1910 and his wife in 1924.

HELD (GREENE, L.J., dissenting): applying the rule which inclines against intestacy, the word "heir" must be construed in its popular meaning of heir apparent or heir presumptive, and the estate passed to the person or persons who would have been the testator's heir or heirs-at-law if he had died at the same time as his wife.

[EDITORIAL NOTE. The difficulty in this case is the not unusual one of the testator having made his will many years before his death in circumstances wholly different from those obtaining at his death. After gifts to his mother and his wife, the testator gave certain property on the decease of his wife to his heir. As the wife predeceased the testator by many years this gift to the heir of a living person naturally raised difficulties. There is some authority for construing such a provision as a gift to the heir-presumptive of such living person, and that course was adopted by the majority in the Court of Appeal, but it does not appear that this rule has ever been applied to where the "living person" is the testator, and it is open to the objection that, if the person thus found should have predeceased the testator, there will still be an intestacy.

FOR THE MEANING OF "HEIR" IN A WILL, see HALSBURY, Vol. 28, p. 749, para. 1378, and FOR THE CASES, see DIGEST, Vol. 44, p. 862, Nos. 7173-7179.]

Cases referred to:

(1) *Lightfoot* v. *Maybery*, [1914] A.C. 782; 44 Digest 864, *7189.*

(2) *Re Winn, Brook* v. *Whitton*, [1910] 1 Ch. 278; 44 Digest 881, *7380.*

APPEAL from a decision of CLAUSON, J., given on July 31, 1935.

The facts and arguments appear from the judgments.

J. Norman Daynes, K.C., and *G. P. Slade* for the appellant Carpenter.

F. H. L. Errington, Roger W. Turnbull and *E. W. Lavington* for the respondents.

LORD WRIGHT, M.R.: The only question in this appeal is whether the testator did or did not die intestate in the sense and for the reason that the provisions of his will are so framed that they do not contemplate or provide for the particular event which has happened. The testator made the will in question on Oct. 11, 1901. At that time he had a mother living, Ann Priscilla Hooper, and also his wife, Jane Ann Hooper. The mother died on July 9, 1909; the wife died on Jan. 21, 1924, and the testator himself died on Aug. 8, 1934. The learned Judge below has held that on the true construction of the testator's will there is no provision

for the eventuality which emerged, namely, the testator dying after his mother and his wife had died.

The will, which seems to have been prepared in a somewhat artistic fashion, after revoking former wills first of all appoints the mother, Ann Priscilla Hooper, sole executrix and trustee. It then proceeds to make a specific bequest of the moneys " standing upon deposit or otherwise " to the testator's credit " at any bank or banks subject to the payment throughout of all my just debts and funeral and testamentary expenses " to the mother and the wife " in equal shares share and share alike." Having disposed of that property the testator then proceeds to dispose of the residue in the following terms :

> I give and devise my freehold house and premises No. 18, Saxon Road, Bow, aforesaid together with all the plate linen china glass books pictures prints and other household effects in and upon the said premises. And also all other freehold or other real properties and all leasehold and personal properties of which I may die seized or possessed unto my mother the said Ann Priscilla Hooper upon trust to receive the rents profits or income thereof and apply the same for her own absolute use and benefit during her life she paying thereout unto my said wife during the life of my said wife an annuity or yearly sum of one hundred pounds yearly such sum to be paid by equal quarterly payments from the date of my decease,

and then he provides for the property on which that annuity is to be charged. He has accordingly provided therefore for the event of himself dying and for the event of the position which is then to follow during the lives of the mother and the wife. He then proceeds to deal with the event of the mother dying before the wife and he does it in this way :

> And from and after the decease of my mother the said Ann Priscilla Hooper upon trust for my said wife (if she shall then be living) for her own absolute use and benefit during her life.

Then he goes on to provide for the death of his wife :

> And from and after the death of my said wife (if she shall have survived my mother) upon trust for such person or persons as at the decease of my said wife shall be my heir or heirs at law absolutely.

He then puts in a proviso in these terms :

> Provided always that if my said wife shall pre-decease my mother then and in such case all the said freehold leasehold and personal properties furniture and effects shall belong to my mother absolutely for her own use benefit and disposal.

The question which has been argued is what is the meaning of the gift from and after the death of his wife supposing that she had survived his mother, the gift which is expressed to be " for such person or persons as at the decease of my said wife shall be my heir or heirs at law absolutely." It is said on the one hand that you cannot have an heir except at your death, *nemo est haeres viventis*, and that therefore the use of the word " heir " must pre-suppose that at the death of the wife the testator

is already dead so that he can have an heir-at-law in the strict sense of the term. The effect of that would be to create an intestacy in that particular state of affairs and would, therefore, *prima facie* be a conclusion against which the court would strain because as has been said very often, and to use the language of LORD SHAW in *Lightfoot* v. *Maybery* (1), at p. 802, "The mind never inclines towards intestacy; it is a *dernier ressort* in the construction of wills"; and I may also refer to the statement in JARMAN ON WILLS, 7th Edn., Vol. 3, p. 2146, para. xiv:

> The rules of construction cannot be strained to bring a devise within the rules of law; but it seems that, where the will admits of two constructions, that is to be preferred which will render it valid; and therefore the court, in one instance, adhered to the literal language of the testator, though it was highly probable that he had written a word, by mistake, for one which would have rendered the devise void.

The argument which has been put forward by Mr. Errington does involve, it seems to me, a somewhat curious use of the word "heir." According to that argument the wife dying after the testator had died, the rule of that construction requires the ascertainment as of a *persona designata* or artificial person of the individual or individuals who would have been the testator's heir or heirs if he had died at the same time as his wife died because the actual heir, according to its true construction in the strict sense of the term, must be the person who at his death is the heir. But if you are to ascertain by some artificial reasoning who would have been his heir if he had died at an entirely different time—that is, at the date assumed to be subsequent to the date of the testator's death at which his wife died—you are dealing with a very artificial and very unnatural use of the term. On the other hand the construction which has been contended for by Mr. Norman Daynes is to my mind much simpler. It is in accordance with the rule which inclines against intestacy and I should think that it is more in accordance with what the testator must naturally have been taken to have intended. If the word "heir" as used in this clause is used in its popular sense, in the way in which people constantly use the word "heir"—the sense in which it is not unnatural to apply it to a will so curiously drawn as this—then it may well be construed to mean the person who shall be—the language speaking from the date the will is made—"my heir at the decease of my wife whether or not I have died at that particular time"; in other words, "If my wife pre-deceases me there will have to be ascertained as a *persona designata*, as the donee of the disposition the person who, according to the ordinary rules of inheritance, would be my heir if I were myself to die at that time," in other words the heir-apparent or heir-presumptive, because for this particular purpose I do not regard the distinction as material. If the word "heir" is construed in the popular sense as one in ordinary practice says "So and so is my heir" at any given moment,

then I find no difficulty in applying the words contained in this disposition to the case where the wife has died, the husband is still alive and the testator would be taken to say to himself: "My mother is dead; my wife is dead; I intend my property to go to my heir and my heir is known now that my wife has died and there is no one else to provide for." In that case I apprehend it would be quite natural and easy to say, though the testator was still at the time living, who was his heir according to that popular interpretation.

For these reasons I think that the will should be construed in this sense and as far as I am concerned I think that the appeal against the order of Clauson, J., should be allowed.

Romer, L.J.: I have come to the same conclusion.

It is said that the testator contemplated that his wife would survive him. It is more than probable, but it does not follow he intended his will only to take effect in the event of his wife surviving him. Nothing surely is better settled as regards the construction of wills than this, that if a testator gives some property to A. for life and directs that after A.'s death the property shall go, say, to A.'s issue then surviving, the gift to A.'s issue takes effect whether A. pre-deceases the testator or survives him, subject of course, only to this, that if A. pre-deceases the testator only those of his issue who were then living and who survived the testator will take. If A. survives the testator the class of his issue will remain open until A.'s death.

Bearing that in mind (and I cannot help thinking that it is necessary, having regard to what has taken place already in this case that that ought to be very carefully borne in mind) I turn to this will. The fact that the mother takes a life interest in the first instance appears to me to be wholly immaterial. I can treat this will as though the testator had given his wife a life interest in his residue and then directed that on the death of his wife the residue should go to such person or persons as at the decease of his wife should be his heir or heirs at law absolutely. Now suppose that the wife survives. With all deference to Mr. Turnbull's argument nobody can have any doubt really as to what the testator has directed. He has directed that on the death of his wife his property shall go not to his heir at law, but to someone who would be his heir at law if he died at the same time as his wife. Mr. Turnbull has asked us to treat these words as meaning no more than, "my heir or heirs at law" and he says that the person who is once the testator's heir at law at his death will continue to be his heir at law—I do not know whether he means so long as he lives or to all eternity. But that is to disregard the words, "As shall be my heir or heirs at law at the decease of my wife." I think it is plain, with all respect to that argument, that if the wife had survived, on her death the residue would have gone not to the testator's heir at law but to someone whom he says would have

been his heir at law if he had died at the death of his wife. Now why in the world should the fact that his wife pre-deceased him make any difference ? The testator has told us : " I want this property to go to my wife for life and after her death I desire the residue to go not to my heir at law if she survives me but to such person as would be my heir at law if I die, say, ten years after I in fact die—if she pre-deceases me by ten years to such person as would be my heir at law if I die in fact ten years before." Why in the world should there be any difficulty in ascertaining who would have been his heir at law if he had died ten years before he in fact died ? With the greatest possible respect to those taking the opposite view I cannot see any answer to Mr. Norman Daynes' argument and in my opinion this appeal must be allowed.

GREENE, L.J. : I have the misfortune to take a different view and in my opinion the judgment of the learned Judge on the question of construction was right.

In every case of a gift to " my next of kin or my nearest relative " or any gift of that kind *prima facie* the rule (and I think it is not only a rule of construction but the natural meaning of the words) is " that the class is to be ascertained at the death of the testator." These were the words of PARKER, J., in *Re Winn, Brook* v. *Whitton* (2), at p. 286. There are, of course, familiar cases where that rule is not applicable. There are many cases (and we are all familiar with them) where the words " next of kin " or " heir " in a particular context have to be construed so as to cover, and to cover only, an artificial class, that is to say, a class to be ascertained on a particular hypothesis. In a case where the testator bequeaths property to A. for life, and on A.'s death " to those who at A.'s death shall be my next of kin," the artificial class has to be ascertained upon the hypothesis that the testator died at the death of A. I read two sentences from THEOBALD ON WILLS, 8th Edn., at p. 377, not as authority but as describing in apt language the class of case to which I am referring :

> But if the gift is, after the decease of the tenant for life, to such persons as shall then be my next of kin, the word " then " must refer to the death of the tenant for life ; and in such a case the class is to be ascertained as if the testator had lived up to and died at the time referred to.

It appears to me, notwithstanding the argument of Mr. Turnbull, that the present case falls within that class and that the language used is apt language to cover an artificial class of heir or heirs at law, that is to say, a class ascertained not at what is *prima facie* the right time, the death of the testator, but at some other time. That, of course, involves inserting the words, " as if I had died at that date." There is no difficulty at all in inserting these words if the hypothesis which the words cover is a hypothesis relating to a date subsequent to the death of the testator himself, because in those circumstances the word " heir " and the words

"next of kin" are not diametrically opposed to that hypothesis but are consistent with it, although in an artificial sense.

In the present case what the lady who is represented by Mr. Norman Daynes has to establish is that at the death of the wife she was the person whom this description fitted. In the first place a testator who is contemplating a class to be ascertained on a hypothesis that he died in his own lifetime would not, in my opinion, choose a word such as "heir" or "heirs." If he is contemplating that the class is to be ascertained on the hypothesis that he is dead, the use of those words is apt whether he is contemplating that the class should be ascertained at his death or at some subsequent date. It appears to me that the words, "my heir or heirs at law" are quite inapt to describe a relationship to a person who is *ex hypothesi* living. If the contention of Mr. Norman Daynes is right it involves implying in this will words which appear to me quite inconsistent with the words "heir or heirs at law"; it involves writing in these words "as if in the case of my wife pre-deceasing me I had died at the moment of her death." It appears to me that it is not legitimate to imply words of that kind which are quite inconsistent with the words used because the words used are "my heir or heirs at law" words which exclude in my humble judgment the ascertainment of that class on the basis of a hypothetical death of the testator in his own lifetime.

The point is a short one and, to a certain extent, I think, a matter of impression; but I found my judgment entirely on the use of the words "shall be my heir or heirs at law" which in my opinion are much too strong to permit of their being construed in relation to a date anterior to the testator's death although they would be susceptible, in an appropriate case, of being construed in relation to a date subsequent to his death which is the common class of case to which I have referred.

I would dismiss the appeal.

Solicitors: *Hedley Norris & Co.* (for the appellant); *Crawley, Arnold & Co.*, *Rider, Heaton, Meredith & Mills*, and *Spring & Co.* (for the various respondents.

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

EVANS *v.* TRIPLEX SAFETY GLASS CO. LTD.

[KING'S BENCH DIVISION (Porter, J.), **February 12, 13, 14, 1936.**]

Negligence—Dangerous goods—Liability of manufacturer.

The plaintiff bought a motor car fitted with a "Triplex Toughened Safety Glass" windscreen of the defendants' manufacture. When the car was being used, about a year after the date of purchase, the windscreen suddenly and for no apparent reason broke into many fragments and injured the occupants of the car :—

HELD : in these circumstances the manufacturers were not liable in damages, for the following reasons : (i) the lapse of time between the purchase of the car and the occurrence of the accident ; (ii) the possibility that the glass may have been strained when screwed into its frame ; (iii) the opportunity for examination by the intermediate seller ; and (iv) the breaking of the glass may have been caused by something other than a defect in manufacture.

[EDITORIAL NOTE. It was sought in this case to render the manufacturers of the windscreen liable in tort to a subsequent purchaser relying upon the following authorities : *Donoghue* v. *Stevenson*, [1932] A.C. 562 and *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85. The chief point in the plaintiff's favour was that there was no apparent cause for the breaking of the glass, and his chief difficulty was the fact that it had been in use for over a year without any accident. The result, therefore, really depended upon whether the plaintiff had discharged the onus upon him of showing beyond reasonable doubt that the injuries were caused by the negligence of the plaintiffs, and it was held that he had not sufficiently eliminated other probable causes so that it might be presumed that the accident was due to a defect in manufacture.

FOR THE LAW ON THIS SUBJECT, see HALSBURY, 1st Edn., Vol. 21, pp. 408, 409, para. 686, and FOR THE CASES, see DIGEST, Vol. 39, pp. 457-459, Nos. 848 857, and Supp.]

Cases referred to :

(1) *M'Alister* (*or Donoghue*) v. *Stevenson*, [1932] A.C. 562 ; Digest Supp.
(2) *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85.
(3) *Farr* v. *Butters Bros. & Co.*, [1932] 2 K.B. 606 ; Digest Supp.

ACTION for breach of duty against manufacturers in supplying a windscreen which broke under ordinary conditions of user. The defendant denied that there had been a breach of a duty and denied the alleged injuries and damages.

In June, 1934, plaintiff brought a Vauxhall Saloon car fitted with a windscreen made of "Triplex Toughened Safety Glass." The Vauxhall Motor Co. fitted the windscreen to the car. On July 27, 1935, plaintiff was driving his car along the Salisbury and Exeter Road, when the windscreen, suddenly and for no apparent reason, broke into many fragments which were projected on to the passengers in the car. As a result of the breakage the female plaintiff suffered a severe shock and the plaintiffs incurred loss and expenses.

Macaskie, K.C., and *Fox-Andrews*, for plaintiffs. Having regard to the evidence of the plaintiff the windscreen burst from no observable

cause and there is a *prima facie* case for defendants to answer. Other evidence given shows that this was not an isolated case, and the defendants admit that 150 windscreens have burst mostly from impact from stones but there were many cases to which they could not assign a reason. The glass was made to stand the stresses and minor shocks of road user, and the inference ought to be drawn that there was a defect in the manufacture of this windscreen. (*M'Alister (or Donoghue)* v. *Stevenson* (1); *Grant* v. *Australian Knitting Mills, Ltd.* (2)). Damages are recoverable for injuries caused by articles not in themselves dangerous but which are likely to become dangerous if defectively manufactured.

E. Holroyd Pearce, and *H. J. Phillimore* for the defendants. The defendants have taken all reasonable measures of care and skill in the manufacture of these windscreens. They were subjected to severe test before they were sent out and if there had been a flaw in this windscreen it would have been detected. These windscreens are not dangerous products in themselves and out of 4½ million supplied only about 140 broke in the manner alleged by the plaintiff and even then no injuries were caused. The windscreen had passed out of their hands to another manufacturer who might quite easily have strained it when it was put into its frame and further they had ample opportunity to inspect and detect faults (*Farr* v. *Butters Bros. & Co.* (3)). *Donoghue* v. *Stevenson* (1) applies to food and drink and only where the article has passed direct to the consumer in the state in which it had been manufactured. In *Grant* v. *Australian Knitting Mills, Ltd.* (2) the garment had gone straight to the purchaser from the manufacturers unaltered.

Porter, J.: This is an action brought by Mr. Evans and his wife against the Triplex Safety Glass Co., Ltd. In June, 1934, the plaintiff bought a Vauxhall Saloon car and at the time Vauxhall cars were fitted with "Triplex Toughened Safety Glass." Mr. Evans bought the car in 1934 with a windscreen fitted with this particular type of glass and drove it until July 7, 1935. On that day he was driving with his wife and boy down to Devonshire and after passing through Salisbury and then leaving Shaftesbury at a moderate pace of 30 m.p.h. there was a report and the windscreen cracked in the form shown in the photograph produced, disintegrated, and great care had to be exercised in pulling up. It disintegrated into small pieces and the centre portion fell out causing small cuts to the boy; a portion fell on to Mr. Evans, and a considerable portion fell over his wife and she suffered in consequence a severe shock.

Now the plaintiff could have made a claim against either the seller of the car or against the manufacturers of the windscreen. The plaintiff suggested that a claim should be made against the defendants, and I can see many good reasons why a claim should be made against them. There was a contractual relationship between the plaintiff and the sellers of the

Vauxhall car and the plaintiff could have sued them for breach of contract but the effect of bringing the claim in negligence is that all the contract goes and the action is brought in tort. The result is that the plaintiff must show negligence on the part of the defendants as there is no breach of warranty as in contract. The plaintiff has therefore framed his case on *M'Alister* (*or Donoghue*) v. *Stevenson* (1). In that case the court by a majority of three judges to two held that the defendants had been guilty of negligence and I am bound by that decision which makes it clear that an action may be brought in tort against a manufacturer for negligence by an ultimate consumer. One has, however, to consider the limitations which give rise to user. The plaintiff must prove negligence and there must not be an opportunity for examination by an intermediate party or an ultimate purchaser. The article must reach the purchaser in the form in which it left the manufacturer. Now in this case I do not propose to make new law or to lay down exact limits and so far as this case is concerned the negligence has been put in this way. The plaintiff says that the proper inference for me to draw is that a flaw in this kind of glass is more susceptible to cause damage than a flaw in other glass, and the fact that it may disintegrate is in itself dangerous and especially as it does so without any warning, and therefore the plaintiff should be able to recover. That is the way in which the plaintiff puts his case.

The evidence given in support of the act of negligence is as follows. The plaintiff, who does not know anything about the technical aspect of the case, said he was driving along the road when the windscreen exploded without any apparent cause. I am not sure that the actual cause of the damage was a light blow on the windscreen which was not noticed by the plaintiff, but a light blow according to defendants ought not to break the windscreen, and I am inclined to agree with this. Now the evidence given by another witness for the plaintiff was that "toughened glass" was not suitable for use in motor cars at all because he said that even if the glass was properly made and manufactured changes of temperature would cause it to disintegrate. He also said that there were other causes which might make the glass disintegrate, namely improperly manufactured glass or a stone jumping up and striking the windscreen or a scratch on the surface. According to the evidence given by the defendants it would need a good deal more than a scratch to cause the glass to disintegrate. They say that it will stand up to ordinary heat and a light blow will not cause disintegration. They point out that the glass is carefully manufactured and properly examined. It is heated up to 600 degrees and they say that this glass would stand up to an ordinary blow from a non-cutting instrument better than ordinary glass and that the usual cause of disintegration was a breakage of the outside surface. In those circumstances am I to infer that properly made glass would never disintegrate without fault ?

In this case I do not think that I ought to infer negligence on the part of the defendants. If I take Professor Low's evidence I ought not to draw the induction that there has been negligence because this glass disintegrates without negligence on the part of anyone. One has to remember that one has three choices as to the glass one can use. There is laminated glass, the "toughened glass" and the ordinary plateglass, and whichever glass one takes one has to take risks. If you use a "toughened glass windscreen" and your car is overthrown you can get out. There seems to be more risks in using the other forms of glass. I do not accept Professor Low's evidence in full. No doubt this glass does suffer from disadvantages. If the outside surface is broken by cutting or if it is strained when it is being screwed into its frame we have disintegration. In this case I cannot draw the inference that the cause of the disintegration was the faulty manufacture. It is true that the human element may fail and then the manufacturers would be liable for negligence of their employee, but then that was not proved in this case. The disintegration may have been caused by any accident. There was every opportunity for failure on the part of the human element in fastening the windscreen, and I think that the disintegration was due rather to the fitting of the windscreen than to faulty manufacture having regard to its use on the road and the damage done to a windscreen in the course of user.

It is true that, as Mr. Macaskie points out, in these cases he has not got to eliminate every possible element, but he has got to eliminate every probable element. He has not displaced sufficiently the balance of probabilities in this case. I think that this glass is reasonably safe and possibly more safe than other glasses. One cannot help seeing that in all these cases one has to look with considerable care. One has to consider the question of time. The plaintiff had had the windscreen for about a year. Then there is the possibility of examination. The suppliers of the car had every opportunity to examine the windscreen. I do not propose to lay down any rule of law; it is a question of degree and these elements must be taken into consideration. This article was put into a frame and screwed; one must consider that. As I have said there is the element of time, the opportunity of examination and the opportunity of damage from other causes. One must consider all these factors.

In *Donoghue* v. *Stevenson* (1) there was a snail in the ginger beer bottle and there was no opportunity of seeing it as you could not see through the glass. In *Grant* v. *Australian Knitting Mills, Ltd.* (2) the article passed on to the purchaser and it is quite clear that a reasonable examination of the garment would not have revealed the presence of the sulphite. That case is different from this. In that case there was found in some of the garments an excess of sulphites and that clearly was the cause

of the injury. Here are a number of causes which might have caused disintegration. I do not find any negligence proved against the defendants and I give the defendants judgment with costs.

Solicitors: *Warren & Warren* (for the plaintiffs); *Ince, Roscoe, Wilson & Glover* (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law*].

BRUCE *v.* ODHAMS PRESS, LIMITED.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **January 13, 14, February 7, 1936**.]

Practice—Pleading—Particulars—Libel—Plaintiff not referred to by name or description other than nationality.

The plaintiff complained that she was libelled by a newspaper article concerning certain aeroplane smuggling exploits of "an Englishwoman." The plaintiff was not referred to by name or description, but alleged that the words "an Englishwoman" referred to her. The defendants applied for particulars of the facts from which it was to be inferred that the plaintiff was the person referred to.

HELD: the defendants were entitled to the particulars asked, and the plaintiff should have leave to supplement the particulars at any time up to 20 days before the trial or at such later time as may be ordered by the Court or a judge or at the trial on such terms as may be deemed just.

[**EDITORIAL NOTE.** The action for libel where what was intended to be a reference to a purely fictitious person is complained of as defamatory of a particular person has now become familiar. Here the person is not fictitious but a particular person described in such general terms—an Englishwoman who is capable of flying an aeroplane—that it is far from clear upon the face of things who is referred to. The judgments—particularly that of SCOTT, L. J.—deal very fully with the pleading point arising thereon, and though particulars are allowed it would seem that the defendant might have applied with a good chance of success to have the statement of claim struck out as showing no cause of action. The amendment of the order made in the Court of Appeal is noteworthy, and the defendant is thereby enabled to supplement his particulars up to the actual trial of the action.

AS TO PARTICULARS, see HALSBURY, 1st Edn., Vol. 22, pp. 453-458, paras. 926-928, and FOR THE CASES, see DIGEST, Pleading, pp. 184-207, particulars in libel actions being on p. 197.

For the R.S.C. Ord. XIX, rr. 6, 7 and XXV, r. 4, see YEARLY SUPREME COURT PRACTICE, 1936, pp. 298-312, and pp. 393-400.]

Cases referred to:

(1) *Jones* v. *Hulton & Co.*, [1909] 2 K.B. 144; on appeal [1910] A.C. 20; 32 Digest 17, *77*.
(2) *Philipps v. Philipps* (1878), 4 Q.B.D. 127; 38 Digest 776, *114*.
(3) *Sadgrove* v. *Hole*, [1901] 2 K.B.1; 32 Digest 116, *1484*.
(4) *Clement* v. *Fisher* (1827), 7 B. & C. 459; 32 Digest 15, *55*.
(5) *Cassidy* v. *Daily Mirror Newspapers, Ltd.*, [1929] 2 K.B. 331; Digest Supp.
(6) *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524; 32 Digest 170, *2086*
(7) *Palmer* v. *Palmer*, [1892] 1 Q.B. 319; 38 Digest 781, *1148*.

Appeal from an order of the Judge in Chambers reversing an order of the Master upon an application for particulars in an action for libel.

The facts appear from the judgments and the arguments are fully stated in the judgment of Scott, L.J.

Valentine Holmes for the appellants.

St. John Field for the respondent.

Greer, L. J. (read by Slesser, L.J.): Mrs. Mildred Mary Bruce, the respondent in this appeal, by her statement of claim alleged that she had been libelled by the defendants in an article appearing in a newspaper published by them called *The People*. The words of the alleged libel, which are set out in para. 3 of the statement of claim, refer to certain aeroplane smuggling exploits of "an Englishwoman," and if it be established that they refer to the plaintiff it is admitted that the statements contained in the article in question are defamatory. The plaintiff alleges in her statement of claim that the words "an Englishwoman" and the other words referring to the woman who is alleged to have been guilty of plane smuggling mean the plaintiff, but the plaintiff is not in the article identified by name or description as the woman referred to. She can only succeed in establishing her case by showing that there were some facts or circumstances which justified reasonable people who read the article in construing the words complained of as referring to her. This being the nature of the statement of claim, the defendants applied for an order for particulars of the allegation that the words complained of were published of the plaintiff. The Master on that application made an order that the plaintiff should within 14 days deliver to the defendants particulars under paragraph 3 of the statement of claim of the allegation that the words complained of were published of the plaintiff and that "Englishwoman," "she" and "her" in the said words means the plaintiff, stating the facts from which it is to be inferred that the words are published of the plaintiff and that the said specific words mean the plaintiff, and he further ordered that the plaintiff should have leave to supplement those particulars at any time up to 20 days before the trial of the action. From this order the plaintiff appealed to the Judge in Chambers, who allowed the appeal, reversed the order of the Master and gave leave to the defendants to appeal to this Court.

In my judgment the order of the Master was right, and the Judge ought not to have allowed the appeal. Though the question is only one relating to particulars and the Court of Appeal has at times been reluctant to consider and allow or dismiss appeals relating merely to particulars, we reserved our decision because the question involved in the appeal is one of principle and there has not so far been any reported case dealing with the question.

It was contended on behalf of the appellants that they were entitled

to the particulars which had been ordered by the Master on the ground that they were necessary and desirable in order that they might be in a position to decide what their defence to the action should be. As far as we can ascertain the question whether a defendant is entitled to the kind of order which the Master made in this case has never come before the court for decision, and it therefore becomes necessary to deal with the question involved in the appeal on principle.

I am unable to attach any importance to the rules of practice prevailing before the Judicature Act. The rules made under the Judicature Act form a code by which we are to be guided in deciding matters of practice and procedure. The first observation that occurs to me as relevant is that it is an essential part of the cause of action of a plaintiff in cases of defamation, whether of slander or libel, that the words are defamatory of the plaintiff. If they are defamatory of some other person, real or imaginary, they do not provide the plaintiff with any cause of action at all. Defamatory statements which are in the air, as it were, and do not appear by their words to refer to the plaintiff, have got to be made referable to the plaintiff by reason of special facts and circumstances which show that the words can be reasonably construed as relating to the plaintiff. It is not sufficient under the existing rules of practice merely to allege in general terms a cause of action. Such cause of action must be alleged with particularity. For example, it would not be sufficient for a plaintiff in an action to trespass to plead "the defendant trespassed on my lands and took away and converted to his own use two of my horses" without stating particulars of the time and place when the trespass is alleged to have taken place. A plaintiff must state sufficient particulars of his alleged cause of action which will enable the defendant to either admit it or deny it or otherwise plead a defence to it. By R.S.C. Ord. XIX, r. 4, it is provided that every pleading shall contain, and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which they are to be proved. The material facts on which the plaintiff must rely for her claim in the present case seem to me necessarily to include the facts and matters from which it is to be inferred that the words were published of the plaintiff. Without a statement of these facts and matters, it seems to me impossible that the defendants could be in a position to decide how to plead to the statement of claim. The matters and facts referred to in the order of the Master seem to me to be material facts on which the plaintiff relies as a matter of necessity in support of her allegation that she was defamed by the article in question, and under the provisions of R.S.C. Ord. XIX, r. 4, such facts ought to have been stated in the statement of claim, and if not so stated the defendants are entitled to have further particulars of the bald allegation that the words referred to the plaintiff.

It was contended by Mr. St. John Field, on behalf of the plaintiff, that the practice before and since the Judicature Acts had always been merely to allege that the defamatory words referred to the plaintiff, and the plaintiff was not under any obligation to give particulars of the special circumstances which show that the defamatory statements referred to the plaintiff. It appears that sometimes such facts and circumstances were pleaded, as they were in the case of *Jones* v. *Hulton* (1). In my judgment the facts and matters referred to in the Master's order were material facts which the plaintiff had to allege to show that she had a cause of action against the defendants. They ought to have appeared in the statement of claim, and as they were not there the Master was justified in making the order that he did.

Mr. Field also contended that in any event the particulars ought not to have been ordered before defence, and he cited in support of this contention R.S.C. Ord. XIX, r. 7 (*b*), but in my judgment the particulars of claim ordered by the Master are necessary or desirable to enable the defendants to plead or to enable them to decide how to plead; they may have to decide whether they ought to deny the claim entirely, put in a complete defence to the claim, or whether they should admit and apologise and if so advised pay money into court. I think the argument based on R.S.C. Ord. XIX. r. 7 (*b*), also fails.

We were referred to a number of cases, but they do not appear to me to afford very much help in deciding the question involved in this appeal. There are, however, observations in the course of the judgments of Bramwell and Brett, L.JJ., in *Philipps* v. *Philipps* (2), at pages 131 and 133-134 which seem to me to be helpful. Lord Bramwell (then Bramwell, L.J.) says: "The object of the rules is threefold. It is that the plaintiff may state what his case is for the information of the defendant." I think "may" there ought to read "shall." The observation of Brett, L.J., in the same case on pages 133-4, is, I think, applicable to the present case. The Lord Justice there says:—"Therefore, again, in their pleadings they ought to state every fact upon which they must rely to make out their right or claim." The facts referred to in the Master's order are certainly facts upon which the plaintiff in this case must rely to make out her claim. Mr. Field contended that the order made by the Master was oppressive because the plaintiff could not be expected at the present time to know all the evidence that she would be able to procure in order to show facts and circumstances which justified some readers of the article in interpreting it as defamatory of the plaintiff. This difficulty is partly provided for by the words of the order that the plaintiff should have leave to supplement the particulars at any time up to 20 days before the trial of the action, but we think it fair that the order should contain the further words "or at such later time as may be ordered by the court or a judge or at the trial on such terms as may

be deemed just." The addition of these words ought to make no difference to the result of this appeal. The appeal should be allowed with costs, but with a direction that those words should be added to the order. The appellants should also have the costs of the appeal to the Judge in Chambers.

SLESSER, L.J.: By R.S.C. Ord. XIX, r. 4, it is provided that every pleading shall contain, and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim, but not the evidence by which the claim is to be proved: and the question which arises in the present case may shortly be put thus: whether it is sufficient in a statement of claim for defamation in which the defamatory matter does not mention the plaintiff at all, merely to insert after the words, "it was an Englishwoman"—"thereby meaning the plaintiff." As has been pointed out by GREER, L.J., the question of the degree of particularity which the defendant may demand in such a case has not been the subject of recent judicial decision. In the case of *Youssoupoff* in which the plaintiff claimed damages for an alleged libel contained in a sound film alleging that the defendants had published in the film pictures and words which were understood to mean that she, therein called "Princess Natasha," had been seduced, Sir Patrick Hastings, for the plaintiff on an interlocutory appeal, agreed to give particulars as to the reasons why the plaintiff was to be identified with the Princess Natasha and in some cases, such as *Jones* v. *Hulton* (1) the circumstances in which it was said that the defamatory statements would be understood to convey a meaning defamatory of the plaintiff in the circumstances were pleaded.

In such a case as the present, the plaintiff, not being actually named in the libel, will have to prove an innuendo identifying her in the minds of some people reasonably reading the libel with the person defamed, for there is no cause of action unless the plaintiff can prove a publication of and concerning her of the libellous matter. See A. L. SMITH, M.R., in *Sadgrove* v. *Hole* (3), at page 4. And such innuendo, being essential to the plaintiff's case, seems to me to fall within R.S.C. Ord. XIX, r. 4, as being a statement of the material facts on which the party pleading relies, without which no cause of action is disclosed. The earlier cases as to the particularity with which an innuendo must be pleaded were concerned rather with the meaning of the defamatory matter itself in some secondary sense, than with the problem whether the person defamed would be understood to be the plaintiff and in such cases the extraneous facts which made a statement, *ex facie* innocent, defamatory had to be pleaded. It was formerly necessary to insert in the declaration by way of inducement a prefatory averment of the meaning of the words, and then by the innuendo to allege that they were used to convey that meaning; the averment containing the necessary particulars. But after the abolition

of the necessity of preliminary averment and facts and the colloquium necessary to support the innuendo had been effected, nevertheless, though evidence be no longer pleaded, the need for assigning a special meaning by innuendo with sufficient particularity remains.

In *Clement* v. *Fisher* (4), on a count that the defendant published of the plaintiff libellous matter without alleging that it was matter of and concerning the plaintiff, Lord Tenterden, C.J., said at page 462 :

> Such an allegation would not have been necessary if there had been in the libel set out anything which clearly applied to the plaintiff—it seems to me quite impossible to say that it has any relation to the plaintiff—There is no averment that the particular matter is of and concerning the plaintiff or any innuendo shewing that it related to the plaintiff.

With the extension of the possibility of innuendoes as to words said to be interpretable by some as concerning the plaintiff, encouraged by such decisions as *Jones* v. *Hulton* (1), and *Cassidy* v. *Daily Mirror Newspapers, Ltd.* (5), the question of particularity in pleading such innuendoes may become as important as the older learning on the colloquium and innuendo to be attached to the defamatory matter itself. But in principle, the general rule as stated by Cotton, L.J., in *Philipps* v. *Philipps* (2), at p. 139, that,

> it is absolutely essential that the pleading not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial,

and the passage from Bowen, L.J., in *Ratcliffe* v. *Evans* (6), at page 532 that

> as much certainty and particularity must be insisted on as is reasonable having regard to the circumstances

have only to be applied to the present case to result in the need for the particulars here sought becoming apparent.

I agree that this appeal should be allowed and the order varied as stated by Greer, L.J.

Scott, L.J. : In this appeal I should have been content simply to express agreement with the judgments already delivered, which I have had the advantage of perusing, but that it seems to me to raise important questions of principle in regard to pleading and the correct interpretation of the leading rules of R.S.C. Ord. XIX, upon which I prefer to express my reasons and conclusions in my own way.

The appeal is from a refusal to order particulars asked for by the defendant under R.S.C. Ord. XIX, r. 7, and as the granting or refusing of such an application is very often a matter of pure discretion with which this Court would not interfere, it is necessary to determine whether that is the case here or whether the learned Judge acted upon some erroneous view of the law. The appellant submits that he did, and puts his case thus : The statement of claim sets forth a libel with adequate innuendoes

as to its meaning; but there is no innuendo fastening the libel on the plaintiff; the words quoted contain no reference whatever to the plaintiff, express or implied; the lady referred to may be purely fictitious; and there is nothing in the statement of claim to identify the lady of the libel with the plaintiff. The absence of any such link makes the statement of claim defective on two grounds: first, that it discloses no cause of action vested in the plaintiff, and secondly, that on the issue of identification it gives the defendants no information as to the case they will have to meet at the trial. On the first ground we submit that under the old pre-Judicature Act practice the declaration would have been demurrable, because it contained no averment of extrinsic facts from which it could be inferred that the libel was in reality directed against the plaintiff, or alternatively that it would be so interpreted by persons knowing those facts. For the same reasons we say that the statement of claim is under the present system lacking in a statement of material facts within the meaning of R.S.C. Ord. XIX, r. 4, which is essential to the cause of action, and that therefore it was liable to be struck out under R.S.C. Ord. XXV, r. 4, as was done in *Philipps* v. *Philipps* (2); or a further and better statement of the nature of the claim might have been ordered under rule 7. On the second ground we submit that the omission of this link is a transgression of the modern rule that however concisely expressed a statement of claim may be, it must contain sufficient information to put the defendant on his guard as to the case he will have to meet at the trial—as in the various specific causes of action mentioned for purposes of illustration in rule 6. Where there is an omission from the statement of claim of averments needed for the protection of the defendant, there is a default under rule 6, and the defendant is entitled *ex debito justitiæ* to an order for proper particulars under rule 7. Thus under either head the issue is appealable and not a matter of discretion. The defendant might have proceeded on the first ground, but is content to have particulars upon the second ground.

For the respondent, the plaintiff in the action, it was contended before us (1) that the words in the statement of claim "published of the plaintiff" were a sufficient statement of the material fact; and (2) that to demand the addition of averments, whether in the statement of claim or by way of particulars, identifying the lady of the libel with the plaintiff would be to transgress the inhibition of rule 4 against pleading evidence.

The determination of the appeal, which was well argued on both sides, involves a careful consideration of R.S.C. Ord. XIX, and especially of the true meaning of "statements of material facts" under rule 4 and of "particulars" under rule 6. That order draws no express line of demarcation between the two, and I am not sure that in some of the judgments in the reported cases the distinction between the two has always been kept as clear as is desirable; but that there is a radical

distinction is beyond question, and none the less so that in cases near the dividing line there is a penumbra where the two may and often do overlap, just as between night and day there is a zone of doubt which we call dusk.

Many of the pre-Judicature Act decisions were cited to us. They are relevant as, within the limits of any issues raised by the present case, the Judicature Acts effected no change in the substance as distinct from the forms of pleading. R.S.C. Ord. XIX, r. 4, lays down the fundamental rules for framing a statement of claim, but they are based on the old principles of law and pleading as applied by the Common Law courts both before and after the Common Law Procedure Acts; and Bullen & Leake, Third Edition, published in 1868, is still the best guide for the pleader on all such questions of principle. The new rules of pleading introduced by and under the Judicature Acts did not release a plaintiff from his obligation to "declare" a legally complete cause of action in his statement of claim.

But the rules of the Supreme Court, as Greer, L.J., has pointed out, now constitute, within the framework of the Judicature Acts, a complete code of pleading, and I think the present case can and should be decided upon the phraseology of the code, referring to the earlier position and decisions only if and so far as necessary to elucidate some point of ambiguity in the language of its provisions.

The cardinal provision in rule 4 is that the statement of claim must state the material facts. The word "material" means necessary for the purpose of formulating a complete cause of action; and if any one "material" statement is omitted, the statement of claim is bad; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under R.S.C. Ord. XXV, r. 4 (see *Philipps* v. *Philipps* (2)); or "a further and better statement of claim" may be ordered under rule 7.

The function of "particulars" under rule 6 is quite different. They are not to be used in order to fill material gaps in a demurrable statement of claim—gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff's cause of action. The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he had to meet and to enable him to prepare for trial. Consequently in strictness particulars cannot cure a bad statement of claim. But in practice it is often difficult to distinguish between a "material fact" and a "particular" piece of information which it is reasonable to give the defendant in order to tell him the case he has to meet; hence in the nature of things there is

often overlapping. And the practice of sometimes putting particulars into the statement of claim and sometimes delivering them afterwards either voluntarily, or upon request or order, without any reflection as to the true legal ground upon which they are to be given has become so common that it has tended to obscure the very real distinction between them.

In a case where there is no omission of material facts under rule 4, whether particulars should be ordered is very often a matter of pure discretion—because it depends on a view of fairness or convenience which is essentially a matter of degree. But where particulars are asked because the statement of claim is defective in that it omits some essential averment—i.e., some "material fact"—the question is not one of discretion, and the adoption by the defendant of the lenient remedy of an application for particulars instead of the more stringent remedy of striking does not turn an issue of right into an issue of discretion. As *Philipps* v. *Philipps* (2) is an illustration of the more stringent remedy, so *Palmer* v. *Palmer* (7) is an illustration of the more lenient remedy; but if in the latter case the defendant had so chosen I think he would have been entitled to the more drastic remedy.

In the present case, if it be assumed that the words contained in para. 3 of the statement of claim "published of the plaintiff" are an insufficient statement of material facts within rule 4, the defendants might have applied under R.S.C. Ord. XXV, r. 4, to strike out the statement of claim as disclosing no cause of action, to take a middle course by applying under R.S.C. Ord. XIX, r. 7, for "a further and better statement of the nature of the claim," and in either case would have been entitled as of right to the order as asked. But plaintiffs are so often in practice allowed to cure an omission to state some "material fact" in the statement of claim by delivering particulars, that the fact that the defendants here asked for particulars instead of adopting either of the above two courses ought not to prejudice their rights; it does not convert an issue of right into a mere exercise of discretion. None the less I think it would tend to promote good pleading if particulars were less used—or abused—as a cover for the omission of "material facts" which ought to have been plainly stated, and if in the future on the hearing of applications parties who attack a statement of claim on the ground that it does not state all "material facts" were called upon to make the proper application rather than merely ask for particulars.

This being the law of pleading as I think it now stands under the code, it remains to consider whether either of the answers put forward on the part of the respondent, as stated above, is sound. As regards the first, under the old law I think it clear that a declaration not identifying the plaintiff in terms would have been held bad; and that the mere insertion of the words "published of the plaintiff" would not have been regarded

as sufficient averment: an averment of facts from which the general public or at least some particular persons or class of persons to whom the libel was published would have understood the plaintiff to be intended, with an appropriate innuendo applying the libel to the plaintiff, in the light of those facts would have been requisite. I agree with the view expressed in Gatley on Libel (2nd Edn.), page 522. It is directly supported by the decision in *Clement* v. *Fisher* (4), where the declaration alleged that the libel was "published of and concerning the plaintiff," a verdict of £30 damages was found for him, and judgment was entered accordingly, but on a writ of error the Court of King's Bench set aside the judgment on the ground that the above allegation was insufficient, there being no innuendo that the matter of the libel related to the plaintiff.

But if this statement of claim would have been bad in the old days, it is equally so now. Mr. Field, I am sure, did not intend to contend that the omission of a necessary averment could be cured by evidence at the trial: but unless he did, his point about evidence is no answer to the defendants' contention that they are entitled as of right to particulars "of the facts and matters from which it is to be inferred that the words were published of the plaintiff," etc., following the words of their application.

And even if the defendants' application for particulars be considered on the alternative footing of rule 6—that the information was required in justness and fairness to the defendants in order to put them on their guard as to the case they will have to meet—I still think that the kind of information for which they ask is essential to enable them to prepare for trial, and is therefore a matter of right and not of discretion. The argument about evidence is irrelevant; the rule merely forbids the pleading of evidence which does not constitute a "material fact" or "particulars."

For the above reasons I think this appeal should be allowed, the order of the Master restored and that the appellants should have the costs of the two appeals and the costs before the Master with a certificate for counsel in any event.

Solicitors: *Lewis & Lewis* (for the appellant); *Kenneth Brown, Baker, Baker* (for the respondent).

[*Reported by* Philip F. Skottowe, Esq., *Barrister-at-Law.*]

W. J. JACOBS *v.* AVELING-BARFORD, LIMITED.

[KING'S BENCH DIVISION (Finlay, J.), **February 10, 11, 1936.**]

Practice—Declaratory judgment—Right to commission as agent—No commission accrued due—R.S.C. Ord. XXV, r. 5.

The plaintiff was a general commercial agent carrying on business in Bucharest, Roumania. In August and September, 1934, the defendants, who were manufacturers of road rollers, instructed the plaintiff to negotiate with a Roumanian firm with a view to securing for the defendants a contract whereby road rollers of the defendants' manufacture might be exported to Roumania. The contract was, in fact, secured, and the defendants admitted that the plaintiff had rendered some assistance "in or about the negotiation of the said contract." The defendants further admitted that as consideration for the securing of the contract the plaintiff was entitled to receive reasonable remuneration in respect of his services, but that such remuneration would not become payable until after the contract had become operative and payments thereunder had been made by the Roumanian firm to the defendants. The plaintiff claimed a declaration as to his rights in respect of commission :—

HELD : this was a proper case for a declaratory judgment.

[**EDITORIAL NOTE.** The usual matters dealt with in declaratory judgments are rights of property rather than rights under contracts. In the present case the judgment rather lays stress upon the fact that the defendants had totally denied that the plaintiff had any rights under the agreement. Perhaps the nearest case to the present is *Wilson* v. *Harper*, [1908] 2 Ch. 370 ; 1 Digest 523, *1830*, but their commission had long been paid and the declaration was only as to the continuance of the liability. The cases in which the court is slow to exercise its discretion in making such a judgment are those in which future or reversionary rights are concerned, and those, as here, where no right enforceable in an ordinary action has yet accrued to the plaintiff. This case can very usefully be compared with *Odhams Press, Ltd.*, v. *London and Provincial Sporting News Agency* (1929), *Ltd.*, [1936] 1 All E.R. 217, where the declaration was refused.

FOR THE LAW ON DECLARATORY JUDGMENTS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 212-217, paras. 511-514, and FOR CASES, see DIGEST, Vol. 30, pp. 142, 143, Nos. 183-264. FOR R.S.C. ORD. XXV, r. 5, see YEARLY SUPREME COURT PRACTICE, 1936, pp. 400-403.]

Cases referred to :

(1) *Guaranty Trust Co. of New York* v. *Hannay & Co.*, [1915] 2 K.B. 536 ; 30 Digest 147, *219*.

(2) *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade, Ltd.*, [1921] 2 A.C. 438 ; 30 Digest, 144, *199*.

(3) *Hanson* v. *Radcliffe Urban District Council*, [1922] 2 Ch. 507 ; 80 Digest, 143, *190*.

ACTION for declaration of the plaintiff's rights as to his remuneration for negotiating the contract on behalf of the defendant company.

W. N. Stable, K.C., and *Melford Stevenson* for the plaintiff.

F. Van den Berg, K.C., and *Harold L. Murphy* for the defendants.

FINLAY, J. : In this case, there was a contract made between the defendants and a company, known as the Malaxa Company, in Roumania.

It was a contract whereby under some circumstances the Roumanian company might manufacture under licence certain steam engines. There was also a provision with reference to the possible purchase by the Roumanian company of steam engines manufactured by the defendants. In the negotiation of this contract it is admitted by the defendants that the plaintiff played a considerable part, and it is quite clear and admitted that the plaintiff is entitled to some remuneration in respect of his services. The contract having been made, discussion then arose as to the terms on which the plaintiff was to be remunerated. Upon the plaintiff putting forward a claim for remuneration the defendants, thinking the claim excessive, wrote a letter to the Malaxa Company saying that they had decided to break with the plaintiff and fight the case. On January 28, 1935, the defendants wrote to the plaintiff saying "We hereby cancel and withdraw all offers of commission and profits on contracts in Roumania." That was unfortunate, because the plaintiff was entitled to some remuneration. The plaintiff thereupon issued a writ for a declaration of his rights as to remuneration. The plaintiff alleged that (1) there was a contract for remuneration, and (2) he was entitled to a fair and reasonable remuneration.

It is clear that the plaintiff was entitled to remuneration. In their defence, the defendants expressly admitted that the plaintiff rendered some assistance and if the contract became operative the plaintiff would be entitled to some remuneration. The whole contest before me was one with reference to costs. The defendants' contention was that this action was entirely unnecessary and that therefore the plaintiff should have no costs. The defendants were willing to admit that the plaintiff was entitled to some remuneration because they thought it was a very remote chance that any sums could ever be paid under the contract. It is impossible to say what business may or may not result, and the point which arose and which was argued very carefully and fully on both sides was with regard to the position of an action of this sort as to a declaration.

The matter depends on R.S.C. Ord. XXV, r. 5. This rule has been subject to considerable discussion in the cases to which my attention has been called. It is not necessary for me to review the case of the *Guaranty Trust Co. of New York* v. *Hannay & Co.* (1), or the case of the *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade* (2). The law is very conveniently stated in *Hanson* v. *Radcliffe U.D.C.* (3) at page 507, by Lord Sterndale, M.R.:

> I adhere to my judgment in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (1), in which, although I had the misfortune to disagree with Lord Wrenbury, I said that a number of declarations had been made, and in my opinion rightly made, as to the rights of parties under contracts without waiting for some event to happen, as, for instance, for a ship to arrive at its destination, in order to determine the

result of the contracts and what the exact causes of action might be. In my opinion, under Order XXV, r. 5, the power of the court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should, of course, be exercised judicially, but it seems to me that the discretion is very wide.

Applying this to the present case. The action here was commenced pretty soon after the contract was made and where, as in this case, the defendants repudiated entirely the right of the plaintiff to commission, the plaintiff was justified in issuing a writ and is properly entitled to his commission. This is a case where the plaintiff is properly entitled to have his rights between himself and the defendants defined. I shall make the declaration asked for and the plaintiff shall have the costs.

Solicitors: *Brown, Turner, Compton, Carr & Co.* (for the plaintiff); *Langton & Passmore* (for the defendants).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

DAVIS & CO., LTD., *v.* BRUNSWICK (AUSTRALIA), LTD., BRUNSWICKE-BALKE-COLLENDER CO. AND BRUNSWICK RADIO CORPORATION.

[PRIVY COUNCIL (Lord Blanesburgh, Lord Maugham, and Sir Sidney Rowlatt), **January 30, 1936.**]

Company—Winding up—Petition—Opposition—"Just and equitable"—Companies Act, 1929 (*c.* 23), *Imp. s.* 168 (6)—*New South Wales Companies Act*, 1899, *s.* 84 (*e*).

The New South Wales Companies Act, 1899, s.84 (*e*) is identical with the English Companies Act, 1929, s. 168 (6), and provides for winding up by the Court when, in the opinion of the Court, it is just and equitable that the company should be wound up.

A large American company trading in gramophone records formed a subsidiary company in Australia. The directors of the subsidiary company who had previously been agents to the parent company, were interested in a competing company and by a special agreement they were entitled to compete with the subsidiary company. These directors were also the holders of all the preference shares in the subsidiary company and had been guaranteed by the parent company or its nominees that the interest on the preference shares should be fully paid for two years after the date of allotment, and that in the event of the subsidiary company being wound up within the said two years 20*s.* in the £1 would be paid in respect of the capital of the preference shares. Within the period mentioned in the guarantee and at a time when, owing to the general depression in trade, business was bad and the subsidiary company was being carried on at a loss the directors presented a petition to wind up the subsidiary company.

HELD: (i) the existence of the guarantee was only material in considering whether a compulsory order shall be made in so far as it biassed the evidence on either side,

(ii) in considering whether it was just and equitable to wind up the company the criterion was not whether the directors were seeking to obtain the benefit of the guarantee or whether the parent company were seeking to carry on the company until such time as the guarantee had expired and thus avoid liability thereunder ; but whether, having regard to all the circumstances, there was at the date of the presentation of the petition a reasonable hope that in time the subsidiary company could be carried on at a profit.

[**EDITORIAL NOTE.** Though the circumstances of this case are in some respects peculiar to itself, it contains an exposition by the highest judicial authority of the application of ordinary company law to a complicated set of facts arising from the existence of parent and subsidiary companies and various associated and competing interests. Despite these complications, the question whether the subsidiary company should be wound up or not was decided upon the single issue whether it could in time be made a profit-earning concern. Where the subsidiary company is a public one with a number of small shareholders, this decision may prove a great safeguard to their interests. The Judicial Committee in the course of its judgment treated the law as laid down in *Loch* v. *Blackwood, Ltd.* [1924], A.C. 783, as settled, and the power to wind up a company is not confined to cases in which there are grounds analogous to those mentioned in the English Companies Act, 1929, s. 168, or the corresponding enactments in the dominions or colonies, but upon any ground that the Court thinks just and equitable.

As to Grounds for Winding Up, see HALSBURY, Hailsham Edn., Vol. 5, pp. 543-548, paras. 882-885, and for the Cases, see DIGEST, Vol. 10, pp. 839-844, Nos. 5502-5558.]

Case referred to :

(1) *Loch* v. *Blackwood* (*John*), *Ltd.*, [1924] A.C. 783 ; Digest Supp.

The Judgment of their Lordships was delivered by Lord Maugham.

Lord Maugham : This is an appeal from an order dated Sept. 9, 1932, of the Full Court of the Supreme Court of New South Wales allowing by a majority (Long Innes and Davidson, JJ., Halse Rogers, J., dissenting) an appeal by the present respondents from an order dated Oct. 9, 1931, of the Chief Judge in Equity of the Supreme Court of New South Wales (Harvey, J.) for the compulsory winding-up of the respondents, Brunswick (Australia), Limited, hereinafter called "the Company." The apparently simple question which arises is whether the Company ought or ought not to be wound up compulsorily on the ground that that course is just and equitable within the meaning of the New South Wales Companies Act, 1899, s. 84 (*e*) (No. 565 of 1931), or more accurately, whether such an order was properly made on the petition to be next mentioned. As will be seen the date of the commencement of the winding-up (if any) is of primary importance in this case.

The proceedings were begun by a petition presented on July 8, 1931, by the appellants, D. Davis and Company, Limited, as holders of 30,000 £1 preference shares and 10,000 ordinary shares in the company. The petition was opposed by two American trading companies, Brunswick Balke Collender Company (called below "the Brunswick Company"),

and Brunswick Radio Corporation (called below "the Radio Corporation"). The former company is the registered holder of 20,000 ordinary shares of the company and the latter is a creditor of the company, and, as will be seen, is or may be entitled in equity to the 20,000 ordinary shares just mentioned. The Chief Judge in Equity on the evidence before him was satisfied that the company had no liquid assets and no capital with which to carry on, and that its prospects appeared to be hopeless. He also inferred from certain cables dated in December, 1930, that the main object of the American companies was to tide over the two years period of a certain guarantee, and not the *bona fide* object of carrying on the business of the company with a view to profit. He accordingly made an order on Oct. 9, 1931, for the compulsory winding-up of the company. The respondents appealed from that order, and the appeals came on for hearing on Nov. 12, 1931. They were adjourned from time to time until Nov. 25, when on the application of the respondents (the appellants before the full court) an order was made for a commission to take further evidence in New York on a defined issue which may shortly be stated as the question whether the persons who controlled the action of the American companies in opposing the petition were acting with the object of carrying on the business of the company to advantage or merely for the purpose of rendering the guarantee above referred to inoperative. It should be explained that the petition itself did not contain any allegation of want of good faith in the respondent companies (a matter on which some reliance was placed by the Chief Judge), and it was therefore urged that material witnesses in the United States were not asked to make affidavits or called before the Chief Judge in Equity; and this contention was accepted by the full court. Sittings of the Commissioner in the United States were held in February and March, 1932, the greater part of the time being taken up with the cross-examination of Mr. Herman Starr, President of the Radio Corporation, who was called on behalf of the present respondents. A considerable number of further documents were put in evidence; and it is clear that the materials before the full court placed that court in a position to form a better opinion on the questions of fact involved in the petition than the imperfect materials on which the Chief Judge in Equity had to form his conclusion. After a long and careful hearing the Full Court delivered considered judgments on Sept. 9, 1932, and in the result the petition to wind up was dismissed.

In order to appreciate the issues which are involved it is necessary to give a short history of the company and to mention the salient facts which emerge from the lengthy evidence placed before their Lordships. Prior to the year 1930 the Brunswick Company carried on a large business in America as manufacturers of gramophones and gramophone records under the mark "Brunswick." The appellants, a company registered

in Australia, carried on a large and profitable business in Australia and New Zealand as distributors of Brunswick gramophones and makers and distributors of Brunswick records as licensees of the Brunswick Company under an agreement dated Oct. 1, 1926. The shares in the appellant company were held at all material times by Herbert Davis Klippel and Jacob Davis Klippel, these two gentlemen being commonly known as Herbert Davis and Jack Davis respectively. On Apr. 9, 1930, an agreement was entered into between the Brunswick Company and Warner Brothers Pictures Incorporated, another American company of very ample means (called below "the Warner Company"). The agreement is contained in a proposal by letter dated Apr. 9, 1930, addressed by the Brunswick Company to the Warner Company, and an acceptance by the Warner Company of the same date. The letter of proposal is only partially set out in the record which creates a difficulty in taking an accurate view as to its true construction and effect. It appears, however, to amount to an agreement by the Brunswick Company to transfer to the Warner Company the musical part of its business, that is to say, the business of manufacturing and selling in a number of countries phonograph records, radio receiving sets and equipment, and also its shareholding in certain subsidiary companies, including the whole of the share capital of the respondents, the Radio Corporation, and the benefit of its licence agreement with the appellants. There was, however, excluded from the agreement for sale any business in Australia or New Zealand. Since shortly after the date of this agreement, the Warner Company has been the holder or owner of all the shares in the Radio Corporation. The Brunswick Company is an independent concern.

On May 13, 1930, three agreements were entered into. The first of these agreements was made between the Brunswick Company, the appellants, and certain other parties, and it provided for the incorporation of the company in New South Wales with a capital of £50,000, divided into 30,000 preference shares (preferential as to dividend and capital) and 30,000 ordinary shares all of £1 each, and the transfer to it by the appellants of the benefit (as licensees) of the agreement of Oct. 1, 1926, and the goodwill and other assets of the appellants relating to their gramophone and record business, and also for the transfer to the company by the Brunswick Company of its goodwill and trading rights in Australia and New Zealand, and the sole right to use in Australia and New Zealand the trade name of "Brunswick" as applied to phonographs and records. The appellants were to take the 30,000 £1 preference shares in the company for the assets transferred by them, other than goodwill and the benefit of the said agreement, and 10,000 £1 ordinary shares for the last mentioned assets. The Brunswick Company was to take the remaining 20,000 £1 ordinary shares for the rights transferred by it. The agreement

conferred upon the Brunswick Company and the appellants respectively pre-emption rights over the shares to be taken by them in the company. It was mentioned in the agreement that the preference shares were to be "guaranteed both as to the half-yearly payment of dividend and return of capital by the Brunswick Company, its successors or assigns," for a period of two years after the allotment of the said preference shares.

The second of the said agreements was made between the appellants, Herbert Davis and Jack Davis, and the company, and was in substance a sale and purchase agreement between the appellants and the company of the goodwill and other assets of the appellants relative to their gramophone and record business. The company agreed to employ Herbert Davis and Jack Davis as consulting manager and consulting engineer respectively for two years at salaries of £1,000 a year each. The agreement further provided that the brothers Davis were to be free to devote a portion of their time to any other business or businesses including those of a company called Clifford Industries, Limited, and of the appellants. It should be explained here that Clifford Industries was a company carrying on business in Australia and New Zealand in the manufacture and sale of cheap records. The Brunswick records were of a more expensive kind.

The third agreement was made between the Brunswick Company and the company. It was in substance a sale agreement between the two companies in relation to the assets which the Brunswick Company had agreed to sell; and further it contained a guarantee "that a dividend (duly earned as certified by the auditors of the company during the year) of £8 per cent. per annum should be paid to the preference share holders" of the company "for each of the first two years after the allotment of the preference shares to be allotted in pursuance of the" first mentioned "agreement of May 13, 1930, and that the amount of nominal capital invested in such preference shares should be paid in full to the holders of such preference shares in the event of" the company "going into liquidation either voluntarily or compulsorily at any time before the expiration of such period of two years." The Brunswick Company further agreed "within six months after the end of the first and/or second of such years to pay to" the appellants "any sum or additional sum requisite to pay such dividend if" the appellants "had not fully earned it and also within six months after such liquidation to pay to" the appellants "such sum as with the amount available in the liquidation would enable the sum of 20*s*. per preference share to be paid to the preference shareholders." All such sums were to be received by the appellants or the appellants' liquidator for distribution to the preference shareholders. It is the existence of this somewhat curiously worded guarantee which has occasioned the main difficulty in the decision of the present case.

It will be noted that the Radio Corporation was not a party to any of these agreements ; but by an agreement dated June 30, 1930, and made between the Brunswick Company and the Warner Company, after recital of the agreements of Apr. 9, 1930, and May 13, 1930, the Brunswick Company amongst other things agreed to use its best endeavours to procure the consent of the appellants to a transfer of the Brunswick Company's shares in the company to the Radio Corporation, and subject to such consent being obtained the Warner Company agreed that it would cause the Radio Corporation to assume the obligations of the Brunswick Company under the third of the contracts of May 13, 1930. It would appear from the evidence before their Lordships that the assent of the appellants to the said transfer was never in fact given in an unconditional form ; and that the Brunswick Company has continued to be liable on the guarantee according to its terms, though whether the Radio Corporation is liable to indemnify the Brunswick Company in that respect has been left in doubt. The agreement of June 30, 1930, is not altogether easy to construe, and their Lordships have not before them a complete copy of all the cables and letters which have passed between the parties. The position, therefore, is that it appears to be uncertain who is the beneficial owner of the 20,000 ordinary shares in the company held by the Brunswick Company, though it is beyond doubt that those shares continued to stand in the name of the Brunswick Company at the date of the petition, and that that company was entitled to appear and to resist the proposed order. The Radio Corporation was also formally entitled to be heard since it was a creditor of the company. In fact, however, the Radio Corporation has acted since June 30, 1930, on the footing that it either had acquired the interest of the Brunswick Company in the company or that it was about to acquire that interest. It nominated the directors of the company, and gave instructions to them from time to time, and it took upon itself the burden of providing the company with funds.

The company was plainly a private company possessing in effect two shareholders only, formed to take over the assets in Australia and New Zealand of the appellants on the one hand, and of the Brunswick Company on the other. The articles of association of the company provided that each member should have one vote for each ordinary share and one vote for every five preference shares, with the result that the holders of the 20,000 ordinary shares would have voting control of the company. The articles further provided that the number of directors should be five, of whom three should always be nominated by the Brunswick Company or its assigns, so that the Brunswick Company were to have a majority at any board meeting. These provisions in the articles were contained in the first agreement of May 13, 1930, and they obviously formed an important part of the bargain between the parties. It must

have been clear that a liquidation on the petition of creditors could always be prevented by the Brunswick Company or its assigns, and that a voluntary resolution for winding-up could never be passed without their consent. Whether the fact that the Court of New South Wales would have power to wind up the company on the petition of a shareholder on the ground that it was just and equitable so to do was present to the minds of the parties who made these agreements in the United States is a matter for conjecture. It may be assumed that all parties contemplated a successful future for the company. The appellants in fact had made a profit of over £20,000 per annum out of the business which they were transferring to the company, and no one probably foresaw the disastrous effects of the great trade depression which began about this time and spread all over the world. The company differed from an ordinary company formed as the result of public subscription in this respect, that it was not provided with any liquid assets for working capital, and the inference may fairly be drawn that it was contemplated that such working capital as was needed until the company began to make considerable profits would be provided by the Brunswick Company or its assigns.

The company took over the business as from May 12, 1930, just at the time when the general decline in trade in Australia began. The first audited account of the company as at June 30, 1930, showed a small net loss for the seven weeks of trading. The second audited account as at Dec. 12, 1930, showed a net loss for the 5½ months of £296. The third and last audited account as at June 30, 1931, showed a net loss in the whole year from July 1, 1930 to June 30, 1931, of £7,032. In January, 1931, the company had obtained from the Radio Corporation a loan of £3,500 on the security of its factory at 8 per cent. per annum interest. It is clear that the Davis brothers, who were directors of the company, nominated by the appellants, as well as its consulting manager and consulting engineer, were not displaying any great zeal in the interests of the company. The exceptional difficulties due to general trade depression and the competition of wireless broadcasts with the sale of gramophone records were further complicated by the competition of the appellants in the rival record business of Clifford Industries, Limited, by the liquidation of various important distributors in Australia, by the high salaries payable to Herbert and Jack Davis and by attempts by the appellants to secure the immediate winding up of the company. The attitude of the Davis brothers only three months after the formation of the company, is well shown by a cable of Aug. 19, 1930, to one C. S. Brice who was acting as representative of the company at the time. It was in these terms : " Confidentially Brunswick unable to make cheap records and only fooling you with promises. Suggest you meet vocalion competition with new two shillings six pence Clifford record quality equal any

four shilling record." It went on to say, "offer you New Zealand exclusive for 200,000 annum."

Brunswick in this cable means the company. Clifford refers to Clifford Industries, Limited, and the offer of an exclusive New Zealand agency for the sale of 200,000 Clifford records per annum to a man employed as a distributor in New Zealand, for the company shows that the Davis brothers and the appellants were construing very liberally the right which they had under the agreement of May 13, 1930, to devote a portion of their time to the interests of Clifford Industries, Limited, and of the appellants. The Davis brothers, further took steps through Clifford Industries, Limited, to oppose the registration by the company of the name "Melotone" for a cheap record which the company proposed to put upon the market, though it is difficult to see what interests of Clifford Industries, Limited, were involved. It appears that as early as Oct. 30, 1930, the Radio Corporation received from Sydney a report that the appellants were endeavouring to force a liquidation of the company, relying on the guarantee of the preference shares, and Herbert Davis did not deny that he had on several occasions suggested that the company would be in liquidation by Christmas, 1930. In the month of December, 1930, certain cables passed between the officers of the Radio Corporation in the United States and the solicitors of the company in Australia from which the Chief Judge in Equity drew the inference that the main object of the American company was to tide over the two years' period of the guarantee; but further cables which were exchanged between the same parties in the months of January and February, 1931, were put in evidence on the hearing before the Commissioner, and these cables went far to, if they did not entirely, displace the inference drawn by the Chief Judge in Equity. The Radio Corporation acting either for themselves alone or for the Brunswick Company and themselves were prepared to purchase the interests of the appellants in the company including their preference and ordinary shares and including also in the terms the settlement of certain disputes, the nature of which does not appear. They offered first £30,000 and, this being refused by the Davis brothers and by a Mr. Hill, a mortgagee of the preference shares (for a sum of £23,000), the offer was increased to £35,000; but this again was refused. On Feb. 27, 1931, there took place in New York an interview at which Mr. Herman Starr, Mr. Herbert Davis, Mr. Julian T. Abeles, Mr. Maurice Goodman and others were present. Mr. Davis at this interview was asking $175,000 for his interests in the company above referred to, a sum largely in excess of £35,000 at the rate of exchange then ruling between the United States and Australia. Mr. Herman Starr declined to give such a sum and made a counter offer of £17,500 which was contemptuously refused. It was alleged by Mr. Abeles, but wholly denied by Mr. Herman Starr, that the latter had stated that the Radio Corpora-

tion intended to carry on the company until the guarantee expired. The cross-examination of Mr. Herman Starr by counsel for the petitioners on this point seems to indicate that he himself placed little reliance on it; Mr. Maurice Goodman who was present was called to support Mr. T. Abeles but failed to do so; and their Lordships note that Mr. Herbert Davis (who was admittedly present) was completely silent on the subject of the alleged statement when he made an affidavit in support of the petition in the following September. In these circumstances their Lordships have little difficulty in holding that the making of the alleged statement was not proved. In any case if it is remembered that the appellants could not by enforcing the guarantee get more than par for their preference shares it becomes evident that there was at this time nothing to suggest that either of the American companies was "acting in bad faith"—a phrase which in this connection can only mean determining to keep the company alive without any hope of its future success solely with a view of depriving the appellants of any benefit from the guarantee. It is plain that if that had been their unique object the Radio Corporation was in a position in the spring of 1931 to cut down expenses to a very low figure and yet to prevent liquidation at the instance of a creditor. The value of the preference shares to the Radio Corporation on that footing would have been no more than the expense of keeping the company alive, and the offers in fact made would be scarcely intelligible. By the month of March, 1931, the position of the company seemed to be better. A cheap record had been introduced under the name of "Panachord" and it appeared to have good prospects of taking the fancy of the public, though the cost of production at this time was too high. A cable was sent on March 31, to the Radio Corporation stating that the company had turned the corner and that the prospects were bright, but that there was temporary embarrassment in financing the distributors of the records; and as a result of further cables the Radio Corporation advanced further sums to the company.

The trade depression in Australia continued to deepen with the result of great distress and many liquidations. In such circumstances it is not altogether surprising that a luxury trade such as that of the company made during its first year, in lieu of the large profits previously made by the appellants, a loss exceeding £7,000. The situation doubtless called for a reduction of working expenses, and a re-organisation of the business. The Radio Corporation, according to the evidence, were willing to finance the business till a real opportunity had been afforded to the company of proving its ability to make a profit in the business it had been formed to carry on. No disastrous event had occurred between the time when the Davis brothers and their mortgagee had refused £35,000 for their interests in the company and the month of June, 1931. There was plenty of time before the guarantee of the preference shares would expire. But

the appellants were not disposed to wait to see whether the position would improve. They called upon the Radio Corporation and the Brunswick Company to consent to a voluntary liquidation and, this being refused, the petition for a compulsory winding up was presented on July 8, 1931. It does not seem to their Lordships that any useful end will be served by considering in detail the evidence in support of and in opposition to the petition as it came before the Chief Judge in Equity since that position has been substantially altered by the further evidence. The question is whether, considering the evidence as a whole, it was just and equitable that the company should be wound up on the petition of the appellants. Three facts have to be borne in mind. The company had lost the sum of £7,000 by its trading since its incorporation, and there were at this time no immediate prospects of carrying on business at a profit. Secondly, the appellants were the holders of the whole of the preference share capital and, having regard to the preference as to capital on the winding-up, there was no chance of the ordinary shareholders receiving any distribution as the result of an immediate winding up. Thirdly, the appellants were in a position, if there was a winding up before the month of May, 1932, to rely on the guarantee given by the Brunswick Company in the third agreement of May 13, 1930. As already pointed out the company had not at this time, and indeed it never had had, any working capital; but the Radio Corporation had supplied it, when necessary, with funds and Mr. Herman Starr had sworn that the Radio Corporation, of which he was the president, was ready to continue to finance the company. It was suggested on the part of the appellants, as we have seen, that the attitude of the opposing companies was dictated solely by an endeavour to prevent the guarantee coming into force, and not the *bona fide* one of carrying on business with a view to profit, which was said to be hopeless. Their Lordships think that it is plain beyond controversy that the attitude both of the appellants and of the respondents has been actuated by the existence of the guarantee. The appellants at the date when the petition was presented had nothing to gain by a continuance of the company, since the solvency of the American companies is not in doubt; and it is easily understood that they were unwilling to run the risk of losing the benefit of the guarantee even if there were a reasonable probability of the company making substantial profits when the world depression should have passed away. On the other hand, the American companies no doubt opposed the petition, partly at least, with a view to preventing the liability of the guarantee accruing to one or other of them. These motives were natural and in the circumstances not improper. The position of the court in determining whether it is just and equitable to wind up the company require a fair consideration of all the circumstances connected with the formation and the carrying on of the company during the short period which had elapsed

since May 12, 1930; and the common misfortune which had befallen the two shareholders in the company does not, in their Lordships' view, involve the consequence that the ultimate desires and hopes of the ordinary shareholders should be disregarded merely because there is a strong interest in favour of liquidation naturally felt by the holders of the preference shares. In this connexion it should be remembered that the company was formed to exploit in Australia and New Zealand an enterprise which originated with the Brunswick Company. It is well settled that the subsection in the (Imperial) Companies Act giving power to the court to wind up a company on the just and equitable ground—a subsection similar in terms of the section obtaining in New South Wales—is not confined to causes in which there are grounds analogous to those mentioned in the other parts of the section. (*Loch* v. *John Blackwood Limited* (1), where the previous cases are referred to.) Nor, on the other hand, can any general rule be laid down as to the nature of the circumstances which have to be borne in mind in considering whether the case comes within the phrase. Holding an even hand between the two conflicting interests in the present case, their Lordships are of opinion that the decisive question must be the question whether at the date of the presentation of the winding up petition there was any reasonable hope that the object of trading at a profit, with a view to which the company was formed, could be attained. In considering that question, the guarantee of the preference shares should be left out of sight, except in so far as it may have biassed the evidence on either side. It should be observed that in this case there is no question of a deadlock, nor is there any question of shareholders who have the voting power using that power for their own commercial interests outside the company in disregard of the interests of a minority. Nor, again, is there any question involved of an improper management of the company by the directors who are in control. The problem involved is of the nature of a business problem. If there was at the relevant time a reasonable hope of tiding over the period of deep depression and of emerging into a region in which the company might reasonably expect to carry on at a profit, there would seem to be no sufficient reason why the court, regard being had to the essential character of the bargain made between the parties on the formation of the company, and considering the matter from much the same standpoint as if the company were a private partnership, should wind up the company under the just and equitable clause.

[Their Lordships then considered the evidence, and concluded that it might reasonably have been expected that the company could have carried on at a profit.]

In these circumstance their Lordships are of opinion that the appellants have not discharged the onus that was upon them of showing that it was just and equitable that the company should be wound up. They

will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors: *Ashurst, Morris, Crisp & Co.* (for the appellants); *Denton, Hall & Burgin* (for the respondents).

[*Reported by* Sam Khambatta, Esq., *Barrister-at-Law.*]

KENYON *v.* DARWEN COTTON MANUFACTURING COMPANY LIMITED.

[Court of Appeal (Slesser and Scott, L.JJ., and Eve, J.), **January 30, 31, February 14, 1936.**]

Factories—Truck Acts—Deductions from wages—Scheme for re-opening factory—Employee's shares—Payment by instalment—Truck Act, 1831, *ss.* 1, 2, 3, 4, 25—*Truck Amendment Act*, 1887, *ss.* 1, 2, 14 *Sched.*

Shortly after entering the employment of the defendants, the plaintiff signed two documents. One was an application to the defendants to allot to her a number of shares in the defendant company. The other contained, *inter alia*, a request that "you [the company] should deduct from my wages each week and allocate towards payment for my shares the following amounts. . . ." Similar applications and requests were later made in respect of further shares. For some weeks the plaintiff received her net wages in coin and an envelope containing the share subscription in coin, which was immediately handed back to the defendants. Thereafter the plaintiff was handed only the net amount and a receipt for the deductions made. The plaintiff sued to recover the amount of her wages which had been applied in payment of shares. The defendants counterclaimed the amount due in respect of unpaid instalments of shares:—

Held: (i) the agreement that deductions should be made from the plaintiff's wages was illegal under the Truck Acts, and the plaintiff was entitled to recover the sum claimed, there being no distinction between the two methods employed for the deductions.

(ii) the agreement to take and pay for shares was not severable from the illegal agreement relative to deductions, and the counterclaim failed.

[**EDITORIAL NOTE.** In this case the mills of the defendant company had been closed on account of the economic depression. The company and the workpeople devised a scheme for re-opening the mills which included the workpeople taking shares in the company, these shares to be paid for by small instalments. Naturally the most convenient course for all parties was that the instalments should be paid when the wages were received by the workpeople. Possibly some scheme may be found to arrive at this result without offending against the Truck Acts. The Court held in the present case that whether these instalments were immediately paid back by the employee on the receipt of his or her wages, or whether they were deducted from the wages the Acts were not complied with and the scheme was void. But here it was a condition of the employment that the employee should take the shares and pay for them by such instalments out of wages in accordance with the request set out in the headnote above. In absence of the condition and request the scheme may be legal; but it may well be that that alternative is impracticable.

For the Effect of Trucks Acts, see HALSBURY, Hailsham Edn., Vol. 14, pp. 654-658, paras. 1237-1241, and for the Cases, see DIGEST, Vol. 24, pp. 938-941, Nos. 263-284, and for the Acts, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 8, pp. 492-498, 504-508, 513-516.]

Cases referred to :

(1) *Penman* v. *Fife Coal Co.*, [1936] A.C. 45.

(2) *Hewlett* v. *Allen and Sons*, [1892] 2 Q.B. 662, *affirmed* [1894] A.C. 383 ; 21 Digest 342, *1311.*

(3) *Williams* v. *North's Navigation Collieries* (1889), *Ltd.*, [1906] A.C. 136 ; 24 Digest 938, *263.*

(4) *Glasgow* v. *Independent Printing Co.*, [1901] 2I. R. 278 ; 24 Digest 937, Case (*k*).

(5) *Gould* v. *Haynes* (1889), 59 L.J. M.C. 9 ; 24 Digest 937, *254.*

(6) *Pickering* v. *Ilfracombe Railway Co.* (1868), L.R. 3 C.P. 235 ; 12 Digest 291, *2391.*

APPEAL by the plaintiff from a judgment given on Aug. 19, 1935, by His Honour JUDGE PEEL, K.C., at Blackburn County Court, and reported in [1935] L.J.N.C.C.R. 309.

The appellant is a weaver living in Darwen, and the defendants are a limited company established (*inter alia*) for the purpose of carrying on the business of manufacture of cotton cloth, and their registered office is at Bowling Green Mill in Darwen. The plaintiff became employed by the defendant company in Sept., 1932, as a weaver at the mill, and was so employed until June, 1935, on certain terms. After she had been working at the defendants' mill for some days, the appellant signed a document by which she applied for 100 shares of 1*s.* each in the defendant company and another document by which she agreed to pay for the shares on certain terms. She was allotted 100 shares in the company.

The appellant brought an action in the County Court to recover the amounts deducted from her wages amounting to £9 18*s.* 3*d.* on the ground that the contract was contrary to the Truck Act, 1831. The defendants counterclaimed £1 11*s.* 8*d.*, being the balance due to them under a further allotment of shares.

The learned County Court Judge held that the contract to take and pay for the shares was not invalidated by the Truck Acts, and thus the defendant company were entitled to set off £1 11*s.* 8*d.* as claimed by them. Judgment was given for the defendant company on the claim and counterclaim with costs.

Sir William Jowitt, K.C., and *Basil Nield* for the appellant : The true position is that the contract was wholly void and the workman had no claim under the contract, but the Legislature had given him a statutory course of action. It is because the whole contract has fallen and the Legislature had recognised that result, that the statutory claim under the Truck Act, 1831, s. 4, was given.

He referred to *Hewlett* v. *Allen* (2), *Williams* v. *North's Navigation Collieries* (1889), *Ltd.* (3), *Penman* v. *Fife Coal Co.* (1), *Glasgow* v. *Independent Printing Co.* (4), *Gould* v. *Haynes* (5).

B. Ormerod (*A. S. Comyns Carr, K.C.*, with him) for the respondents : The learned County Court Judge was right in drawing the inference that the system amounted in fact to a payment in coin of wages earned

by the workpeople. The second envelope was handed to the employee that it could be handed back to the employer, but there was no obligation upon the employee to do so, and it was not a condition of the employment that she should. That was an intention. The learned County Court Judge held that there was no obligation to pay that money back. There was a hope on the employers' part, and it was fulfilled, but the inference of fact which the learned County Court Judge has drawn was justified by the evidence.

Eve, J.: Was there any evidence that she could have gone out without giving the envelope to the clerk on the other side?

Ormerod: It is the effect of the evidence. The scheme was not imposed upon the employees by the employers. The mill had been closed on account of bad trade. The employees were anxious to co-operate in any scheme which would result in the mill being opened, and it was the suggestion of the workpeople that a system of this kind should be devised whereby they could put additional capital into the company and enable the mill to be run.

Until the hearing in the County Court, the respondents took the view that the deductions they had made were not avoided by the Truck Acts. As a result of the decision in *Penman* v. *Fife Coal Co.* (1), this was thought not to be so. As to the counterclaim, if the contract to take shares could be detached from the other part, there would be a valid contract under which there could arise a right to set off or counterclaim. The agreement entered into was for the mutual benefit of both employers and workpeople, and could not be held to be an illegal arrangement or contrary to the Truck Acts. [He referred to *Pickering* v. *Ilfracombe Railway Co.* (6).]

Slesser, L.J.: This appeal concerns a claim made under the Truck Act, 1831, s. 4, for £9 18*s.* 3*d.*, being wages which the plaintiff alleges have been earned by her in the service of the defendants and not paid in current coin of the realm. The defendants counterclaim to set off against the sum claimed by the plaintiff £11 9*s.* 11*d.*, or some lesser sum, which they say is owing to them in respect of certain shares in their company which have been allotted to the plaintiff.

The material facts of the case are as follows. In 1931 the defendant company was compelled to close its mills, including the Bowling Green Mill (where the plaintiff subsequently worked at the material times) owing to economic depression. Early in 1932, as a result of joint consultations between the company and their ex-employees, a scheme was devised whereby the operatives might find capital to finance the company by subscribing for shares either by lump sums or by sums proportionate to the wages which they would earn. It was, says the learned County Court Judge,

> a part of the scheme that shares should be paid for by extremely small and

extremely frequent instalments, and that those instalments should be paid weekly out of the wages that the operatives may receive.

The articles of association were amended on Aug. 8 and 18, 1932, to admit of these purposes, including the prohibition of the transfer of the holdings to non-members without the sanction of the Board, and on Aug. 10, 1932, the Bowling Green Mill re-opened for work.

The plaintiff was first employed at the mill on Sept. 5, 1932, and, in accordance with the general practice, a few days later she signed two documents bearing date Sept. 5, 1932—the one requesting the allotment of shares, the other agreeing that the shares should be paid for out of the wages earned with a request that they should be deducted from the wages each week. The two documents were as follows:

To the Directors of the Darwen Cotton Manufacturing Co., Ltd., Sept. 5, 1932. Gentlemen, I request you to allot me 100 shares of one shilling each in your company and I agree to accept the same or any less number that you may allot to me. I offer to pay for these shares at the rate of not less than ¼d. per share every seven days until the shares are fully paid and to hold the same upon the terms of the memorandum and articles of association of the company, and I authorise you to place my name on the register of the members of the company in respect of the shares allotted to me. It is understood that I shall have permission to pay larger amounts than above in respect of the said shares if I so desire.

The second document is:

Gentlemen, with reference to my application for shares in your company, it would be a convenience to me if you would be willing to make arrangements for payment for such shares out of the wages which I may earn in your employment, and I suggest and request that you should deduct from my wages each week and allocate towards payment for my shares the following amounts: If my weekly wage shall not exceed 30*s*. then I request you to make an allocation towards the shares of 10 per cent. of such wage. If my wages shall be over 30*s*. but not exceeding 38*s*. then I request you to make an allocation of a sum equal to 12½ per cent. of such wages. If my wages shall be over 38*s*. then I request you to make an allocation of 15 per cent. of such wages. This request, of course, is understood to be revocable by me at any time on a week's notice.

On July 25, 1933, and on Jan. 3, 1935, the plaintiff similarly applied for further shares, and agreed to the method of payment by deduction as aforesaid.

Two methods of carrying out this scheme were in operation during the period of the plaintiff's employment. Down to Nov. 3, 1932, the learned County Court Judge has found that the practice

was to hand to every operative, including the plaintiff, loose coins equivalent to the amount of his or her net wages, after all deductions had been made, together with an envelope containing coins equivalent to the share subscription then due from him or her, and for the operative forthwith to hand back that envelope with its contents to a clerk who sat beside the clerk who was paying out wages, in exchange for a receipt. The receipt was on a printed form bearing the printed signature of the company's manager and the initials of the clerk. It was expressed

in the words "received the following amount on account of payment for your shares" followed by the operative's works number, the amount and the date.

After that day the use of envelopes was discontinued, and all that was handed to the operatives was the net amount of his wages after all deductions, including the deductions for shares made, and a receipt given for the amount of the share deductions.

In my opinion, no difference of principle arises between these two methods. If the latter method was a violation of the Truck Acts, so also was the former. That is to say, although up to Nov. 1932, the plaintiff was given coins of the realm equal in amount to the whole of her wages, the arrangement (which was part of the general dealing between the parties) that she should straightway hand them back to an agent of the company, makes it impossible for the employers to say that those coins, though paid to her in one sense, were actually paid to her as wages. Although possibly not devised to avoid the Truck Acts, yet the transaction was merely colourable in that she was under obligation immediately to part with the coins so that they never became in her hands a payment for wages at all.

I disagree, therefore, with the learned County Court Judge when, having found

that it was intended that so many of those coins as were required to pay the weekly instalment on her shares should as a matter of convenience be immediately handed back by her to the company's representative,

he erroneously applied the test that in his view

there would have been no breach of contract had the plaintiff walked out of the pay room with those coins and later the same day returned with other coins of an equivalent amount and paid those other coins to the company.

The test to be applied under sect. 4 is: Were her wages actually paid to her in the current coin of the realm? To my mind it is clear that they were not.

So far as concerns the later arrangements between the parties to pay for the shares by direct deduction it is scarcely disputed but that this plaintiff did not have her full wages paid in current coin of the realm. The fact that she acquiesced, directly or inferentially, to such deductions is no defence. See *Penman* v. *Fife Coal Co.* (1), where a workman having signed a written consent to a deduction from his wages to pay his father's rent, it was held that he was entitled to recover the sum claimed as the deductions were illegal, null and void. In *Hewlett* v. *Allen & Sons* (2) it had been held in the Court of Appeal that the plaintiff was precluded by her acquiescence in certain deductions from wages paid over to a benefit club from recovering those amounts under the Truck Act, but the House of Lords, while dismissing the appeal on the ground that the respondent by making the weekly payments to the club with the assent of the appellant had discharged his obligations

to her, proceeded on the basis as was stated by LORD HERSCHELL at p. 389, that

> a payment made by an employer at the instance of a person employed to discharge some obligation of the person employed . . . . is in the sense and meaning of those sections a payment to the person employed as much as if the current coin of the realm had been placed in his or her hands.

That is to say, as was pointed out by LORD MACMILLAN in *Penman's* case, although the Court of Appeal had held that the deductions were in contravention of the statute, the House had held there was no contravention (p. 54). In the present case, the deductions were actually made in order to pay the employers themselves, and, in this respect, this case resembles the case of *Williams* v. *North's Navigation Collieries* (1889), *Ltd.* (3), where a court of summary jurisdiction having ordered a workman to pay to his employer in respect of breaches of contract to work, it was held that the Truck Act did not allow the employer, when paying wages, to make deductions to cover such payments, as such deductions were not expressly sanctioned by the Truck Act, 1831. There LORD ATKINSON points out that in *Hewlett* v. *Allen* (2), at p. 145, the payments were in effect made by the master out of the wages by the authority of the workman for certain purposes not prohibited by the Truck Acts.

I think that the effect of the Truck Act, 1831, s. 1, which provides that:

> In all contracts hereafter to be made for the hiring of any artificer [now workman, see Truck Act, 1887, s. 2] the wages of such artificer shall be made payable in the current coin of this realm only and not otherwise,

makes the contract in the present case illegal, null and void, for there being in the opinion of the County Court Judge, a contract between the woman and the defendant company that a certain part of her wages should be applied in the purchase of shares, coupled with a finding of fact that the plaintiff owed the continuance of her employment to the signature of her application for shares and the request that they should be paid for by deduction, and further that those were terms of the contract under which her employment was continued, it follows that the contract taken as a whole was one whereby she was to receive consideration for her labour in part otherwise than by payment of wages in current coin of the realm.

Moreover, by sect. 3 of the 1831 Act, there being an obligation actually to pay the wages in such coin of the realm, every payment in respect of such wages otherwise than in the coin of the realm being declared illegal, null and void, it follows that both the contract and the payment (insofar as it was otherwise than in coin) were alike ineffective.

On this finding, sect. 4 of the 1831 Act comes into operation and the plaintiff, by statute, became entitled to recover so much of her wages

as had been actually paid not in current coin. Her claim therefore succeeds.

But the matter does not end here. The defendants, as I have said, have counterclaimed for the price of the shares which she has undoubtedly received, and their right to be paid for such shares must depend upon whether the agreement to take and pay for the shares is so severable from the illegal contract to be paid otherwise than in current coin of the realm as to be enforceable. The learned County Court Judge has come to the conclusion that these are severable agreements, for he distinguishes between the contract to purchase the shares and the contract for the payment of the purchase price out of wages. In my opinion, this is an unjustifiable distinction. I am unable to distinguish when all the circumstances of this case are considered between the case where there was a direct agreement for the deduction from wages to be applied to purchase shares of the defendant company such as was the case in *Glasgow* v. *Independent Printing Co.* (4), which I think was rightly decided, and the present one where the only difference is that there are two documents instead of one, the former being an application for shares and the latter, signed and dated the same day, an agreement purporting in terms to refer to the former, that the payment for such shares should be out of the wages. The second document, which has been called the "request," says:

> With reference to my application for shares, it would be a convenience to me if you would be willing to make arrangements for payment for such shares out of the wages, and I suggest and request that you should deduct from my wages each week and allocate towards payment for my shares the following amounts.

Not to regard these documents as the terms of one contract and that the contract containing the consideration for the labour of the plaintiff, appears to me to be entirely artificial, and in my view what is said to be enforced by the set-off or counterclaim is no more than the enforcement of a term of what I have decided to be an illegal and void contract.

It is further argued that, in so far as sect. 4 of the 1831 Act entitles the plaintiff in a proper case to recover the whole or so much of the wages earned by her as have not been actually paid in the current coin of the realm, sect. 1 cannot have the effect alleged of completely destroying the contract of employment for, it is said, were it so, there would be no wages in whole or in part to be recovered and the appropriate remedy would be in damages for a *quantum meruit*.

I do not so read the Act. In my opinion, sect. 1 makes the whole contract illegal, the contract being, according to sect. 25, inclusive of any agreement, understanding, device, contrivance, collusion or arrangement whatever on the subject of wages to which the employer and artificer are parties or are assenting or by which they are mutually

bound to each other or whereby either of them shall have endeavoured to impose an obligation upon the other of them.

These words are clearly wide enough to cover the whole of the arrangements here made ; but while the whole contract is at an end, the wide definition of wages, that is " any money or thing had or contracted to be paid, delivered or given as a recompense, reward or remuneration for any labour done," seems to me sufficient to identify the word " wages " in sect. 4 as being the remuneration for labour done without any necessity to have further recourse to sect. 1 except as a matter of quantification to see what those wages actually were. It was further said, in answer to this reliance on this wide definition, that this definition of the word " wages " had been repealed by the Truck Amendment Act, 1887, in the schedule which excludes from sect. 25 of the Act of 1831 the words from " ' all workmen ' to ' purposes aforesaid '." The words " purposes aforesaid " occur twice in sect. 25, but it is quite clear not only as a matter of general construction, but as a matter of definition derived from the context that it is the first time the term " purposes aforesaid " occurs which is the terminus of the words to be deleted. That is to say, there being substituted by sect. 3 of that Act, any workman, as defined in the Employers and Workmen Act, 1875, in place of the word " artificer " in the 1831 Act, this is but a consequential amendment, deleting the definition of " artificer " and no more. The definition of wages stands as it did in the Act of 1831.

In the result, therefore, I am of opinion that this appeal succeeds ; that there should be judgment for the plaintiff for £9 18*s.* 3*d.*, that the counterclaim should be dismissed, and that the appellant should have the costs of the appeal and the costs of the claim and counterclaim below. The costs in the County Court to be on Scale C.

SCOTT, L.J. : I agree with the general statement of the facts by SLESSER, L.J., in his judgment and with the result at which he arrives. I have considered all the main decisions and believe that the following interpretation of the relevant sections of the Acts is consistent with the present state of the authorities. I do not propose to discuss them at large, although I shall, at a later stage of my judgment, refer to certain expressions of opinion in them. I base my judgment upon that interpretation.

By the Truck Act, 1887, s. 1, it and the principal Act (that is that of 1831) are to be construed as one Act. Sect. 2 extends the categories of workmen to whom the Truck Acts apply. The plaintiff is a workman within the extended categories. Sect. 14 adopts the definitions contained in sect. 25 of the 1831 Act (except for a repeal of the early part of sect. 25 which is irrelevant to the present case). The definitions of " wages " and still more of " contracts " contained in sect. 25 of the 1831 Act (as amended) are of cardinal importance to the interpretation of the

crucial sections of the combined Act, upon which this appeal turns. They are as follows :

Within the meaning and for the purposes of this Act, any money or other thing had or contracted to be paid, delivered or given as a recompense, reward or remuneration for any labour done or to be done, whether within a certain time or to a certain amount, or for a time or an amount uncertain, shall be deemed and taken to be the "wages" of such labour; and within the meaning and for the purposes aforesaid any agreement, understanding, device, contrivance, collusion, or arrangement whatsoever on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and (workman) are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an obligation on the other of them, shall be and be deemed a "contract."

Both definitions disclose an intention of the Legislature to avoid the risk of narrow legal interpretation; to include within the word "wages" any consideration whatsoever given or to be given in or under or for the contract of hiring, and within the word "contract" any arrangement whatsoever, direct or indirect, or whether actually agreed to, or only a term which "one party to the hiring contract has endeavoured to impose on the other, on the subject of wages." It is plain from the quite extraordinarily wide and all-embracing phraseology of the section, that even collateral arrangements affecting, however indirectly, the hiring relationship between employer and workman must be deemed to fall within the word "contract," wherever that word is used in the operative sections of the Acts. It is thus necessary to embark upon the task of construing those sections with the above mandatory direction of sect. 25 always in mind because without it some of the provisions might easily be given too narrow a meaning. The vital sections are the first four of the 1831 Act.

"Wages" and "contract" being so defined, sect. 1 makes it expressly illegal for the employer to give to the workman for his labour any consideration whatsoever except current coin of the realm. In addition, it forbids any promise—whether in the hiring agreement itself, or in some separate agreement entered into by way of consideration for, or as a condition of the making of the hiring agreement—by the employer to give to the workman money's worth instead of current coin If the employer, for instance, is a company and persuades a workman to enter into or remain in its service on the terms of his accepting a portion of his wages in the form of certificates for shares in the company or in signed receipts for payment of instalments of the cost of such certificates, the wages are in part "payable in a manner other than payment in current coin," and the transaction falls within the express prohibition. And by whatever device or understanding and however indirectly this result is brought about, the inhibition of the statute attaches. If the agreement took the form of an independent and voluntary application by the work-

man for shares, and an arrangement for weekly payments of the application money with nothing else said, but there was an understanding that the workman would out of his wages make the weekly payment, I think the wages would be payable in shares and not in current coin, and therefore in defiance of sect. 1, just as much as if the hiring agreement itself said that the employer would pay the workman so much in current coin and the balance in signed receipts for instalments of application money. The former would be merely an "indirect device" for bringing about the same result as the latter arrangement would achieve "directly." The provisions of sect. 25 that a mere "understanding," and *a fortiori* a mere "endeavour to impose an obligation" is to be deemed a "contract" are in my view conclusive that this extremely wide view of the scope of sect. 1 is right. If it is, then the whole network of

> agreements, understandings, devices, contrivances, collusions whether written or oral, whether direct or indirect to which the employer and workman are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an obligation on the other of them

is made illegal by the last line of the section.

Sect. 2 proceeds on the basis of this same wide conception of the contractual relationship. It assumes a case in which there is no contravention of sect. 1, and is aimed only at arrangements as to the way in which wages in current coin of the realm are to be "laid out or expended." It expressly prohibits the insertion of any such arrangements in the "contract" and as a sanction for enforcement the whole "contract" (defined as above) is, in the event of breach of the prohibition, made illegal and void: the collateral arrangements and understandings are swept away as unequivocally as the hiring agreement itself.

If sects. 1 and 2 have the above effect, sect. 3 would seem at first sight superfluous; and for that reason might afford ground for argument that sects. 1 and 2 cannot have the meaning I attribute to them. There are, however, two answers to that argument. In the first place, the statute was intended to be a charter of liberty to workmen which they could easily understand; and in 1831 the education of the working classes was not what it is to-day. It was for this reason important for Parliament to make very plain—even to the point of repetition—the workman's right to receive his whole remuneration in current coin of the realm. In the second place, the phrase "actually paid" both bears out the same intention, and as it seems to me, imports something further. The money must be paid over so completely and finally that it then and there becomes the workman's very own, being received into his possession subject to no sort or kind of undertaking however tacit that he is either to return any part of or use it in a particular

manner or lay it out for a particular purpose. The phrase precludes the idea of any payment which is not final and absolute; it calls for a payment which shall leave the payee wholly free and untrammelled in his enjoyment of it, and by implication forbids the exaction of any condition or promise or obligation from him as recipient as to what he will do with his money after receipt.

Sect. 4 manifests the same intention to make the workman's rights absolutely clear; but it is in addition an indispensable provision. The whole of the contractual arrangements between the parties being void, the workman is left with no contract upon which to found a cause of action for wages. It is therefore necessary to give him a statutory right of action, and this is the main purpose of sect. 4. But for the extremely wide definition of the word "contract," contained in sect. 25, it might have been arguable that the "contract" avoided by sects. 1 and 2 was only so much of the contract of hiring as offended against the provisions of those sections. But that definition precludes any such limiting construction, and makes it clear, as I have said above, that the whole set of arrangements between employer and workman which contain or are directly or indirectly concerned with the agreement of hiring are brought within the statutory net and avoided lock, stock and barrel, if any one provision offends against the statute. I merely add, to avoid misconception, that there may be lawful agreements so completely severable from the tainted "contract" as defined by sect. 25 as to permit a decision on particular facts that some such agreement lay outside the mischief of the statute; but it is not necessary or desirable to express any opinion about such a possible case—even as to its possibility.

Sect. 4 does not expressly state what is to be the measure of the statutory right to wages, nor what the conditions of service are to be, but I think the proper construction of the section is to treat it as repeating those terms of the agreement of hiring which do not offend directly or indirectly against the statute: there is no other measure of amount or time of payment or of the necessary terms of the mutual obligations under the hiring relationship.

Sects. 5 and 6 of the Act of 1831 and sect. 5 of the Act of 1887 are not easy to fit into the general framework of the Acts, and they have caused much legal doubt in the past. But for reasons I give below I do not think that the decision of this case turns upon them.

In the present case the learned County Court Judge has clearly found as a fact that the understanding of the plaintiff to take and pay for shares, in accordance with the practice described by him in his judgment, was an integral part of her contractual arrangements with the defendant company, which included the actual agreement of hire. The whole of the arrangements followed by the bulk of the employees at

the mill as a whole must, on the findings of the learned Judge, for the purposes of the Truck Acts be regarded as a course of dealing agreed between the parties to this appeal and included within the contract of hire in the wide sense of the word "contract" as defined by the Acts. There can be no question that as from Nov. 3, 1932, when the practice of putting the amount of the weekly share subscription into a separate envelope was discontinued, the procedure followed was an offence against the statute, and that the whole set of arrangements was avoided by the express provisions of the statute. I do not think that the device of putting part of the wages into one envelope, and another part equal to the amount of the weekly subscription which the employee had undertaken to make in part payment of his share, into a second envelope, makes any difference in law. It was, I think, a mere "understanding, device, contrivance, collusion or arrangement" within the meaning of sect. 25 and was therefore forbidden by the express prohibitions of sects. 1 to 4 of the Act of 1831. I do not think that there is anything contained in any of the judgments in *Hewlett* v. *Allen* (2), *Williams* v. *North's Navigation Collieries* (1889), *Ltd.* (3), or *Penman* v. *Fife Coal Company* (1) which is inconsistent with my interpretation of the sections as stated above, and, on the contrary, it was repeatedly pointed out in those cases that an employer is not entitled to retain a part of the workman's wages in payment of a debt to himself, as was the case here.

It only remains to consider whether the alternative counterclaims, or any of them, of the respondent company were admissible. In my view none of them were, as the cause of action upon which the counterclaim was based was the very agreement to take and pay for shares which, if the previous part of this judgment is correct, was avoided by the wide operation of sects. 1-4 interpreted in the light of sect. 25 of the Act of 1831. This distinguishes the position in the present case altogether from what it would have been if a counterclaim had been based on some entirely separate contract which fell wholly outside the statutory net thrown over the contract of hiring as defined by sect. 25 of the Act of 1831—as, for instance, a debt of the workman for a private loan from the employer. That kind of question is wholly outside the facts of the present case, and I say nothing about it.

In the result I agree that the appeal should be allowed; that judgment should be entered for the appellant for £9 18*s.* 3*d.*, and that the counterclaim should be dismissed.

EVE, J.: I agree that this appeal must succeed. Throughout the whole period of the plaintiff's employment by the defendant company there was, in my opinion, a persistent disregard of the statutory obligation to pay to her in the current coin of the realm the entire amount of the wages earned by her for her labour at the mill.

Moreover, it was a term of her employment that she should apply for and accept allotments of shares in the company's capital and that payment for such shares should be made by deduction of the same from her wages earned in the company's employ. On the evidence it is impossible to say that the contract to take and pay for shares was a separate one and, in my opinion, the arrangement relating to the shares was only another attempt to evade the provisions of the Truck Acts.

Solicitors: *L. Bingham & Co.*, agents for *T. Holden, Blanthorne & Davies*, Blackburn (for the appellant); *Haslam & Sanders*, agents for *Hindle, Son & Cooper*, Darwen (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re SCHNAPPER, WESTMINSTER BANK LTD. *v.* SCHNAPPER

[Chancery Division (Clauson, J.), **February 19, 20, 1936.**]

Executors—Legacy—Voluntary unaertaking to pay money—Will directing undertaking to be fulfilled—Money payable in foreign country and in foreign currency.

In 1911, S., a German subject living in England, executed in Germany, together with his brothers and sisters, a document which recorded their intention to make gifts to certain members of the next generation of the family. S. undertook *inter alia* to give to E. B. S. on attaining the age of twenty-five, or marrying under that age, 100,000 marks. In June, 1922, being then a naturalised British subject domiciled in England, S. made his will and directed his trustees to fulfil his obligations under the document of 1911. S. died in Oct. 1922, and E. B. S. attained the age of twenty-five in 1934. Upon a summons taken out to determine the validity of the document of 1911 and what, if any, sum should be paid to E. B. S., either under that document or under the will of S.:—

Held: (i) the document of 1911 was merely a record of intention and not a deed of family arrangement and was not enforceable in a German court.

(ii) the legacy under the will was one not of 100,000 marks, but of such sum as would give to E. B. S. a sum which S. would have had to give her if there had been an enforceable obligation under the document of 1911.

(iii) the German court, acting according to German law, if it had to value the obligation treated as a binding obligation, would have put the figure at approximately £5,000, and E. B. S. was entitled to that sum with interest from Oct. 31, 1934.

[EDITORIAL NOTE. Having regard to the view taken by the learned Judge as to the effect of the family document and the will taken together, the sum to be paid appears to be a debt payable in a foreign country and in the currency of that country. The "exchange" point is therefore covered by the case of *Societe des Hotels Le Touquet-Paris-Plage* v. *Cummings*, [1922] 1 K.B. 451, and a payment which would satisfy the debt at the due date in the foreign country is all that could be claimed. The case is interesting as giving in brief the manner in which debts expressed in the old currency in Germany are now to be met.

As to Payments Expressed in Foreign Currency, see HALSBURY, Hailsham

Edn., Vol. 10, pp. 150, 151, para. 191, and FOR THE CASES, see DIGEST, Vol. 35. pp. 172-176, Nos. 31-63.]

Cases referred to :

(1) *Re Chesterman's Trusts, Mott* v. *Browning*, [1923] 2 Ch. 466 ; 35 Digest 169, *12.*
(2) *Peyrae* v. *Wilkinson*, [1924] 2 K.B. 166 ; 35 Digest 174, *48.*
(3) *Société des Hôtels Le Touquet-Paris-Plage* v. *Cummings*, [1922] 1 K.B. 451 ; 35 Digest 173, *36.*

SUMMONS for directions asking whether an agreement made in Frankfort, on Mar. 21, 1911, by Siegmund Schnapper, whereby he agreed to give to Edith Betty Schnapper the sum of M.100,000 on her twenty-fifth birthday or on her marriage (if earlier) was valid or void, and if valid, what sum ought to be paid under it, and if it be void, whether by virtue of clause 13 of the will of Siegmund Schnapper, dated June 25, 1922, the defendant Edith Betty Schnapper is entitled to a sum which would provide M.100,000 at the rate of exchange current on Oct. 10, 1922, the date of the testator's death, or of such a sum as would provide it at the rate of exchange current on Oct. 31, 1934, when she attained twenty-five, and if interest was payable on such sum as might be awarded.

The material part of the agreement was as follows :

Siegmund Schnapper in London for himself and his heirs undertake that Edith Betty Schnapper in the event of her not representing her sister, Nelly by the date of her twenty-fifth birthday or the date of her marriage, if previously, shall be given the sum of M.100,000 on her marriage and in the event that she shall remain unmarried at that date, on her twenty-fifth birthday.

The material part of the will was as follows :

13. Whereas by a family agreement dated March 21, 1911, under which we have undertaken to carry out what we believe to be the last wishes of our dear mother, I have undertaken to pay to my niece Edith Betty Schnapper on her attaining twenty-five or on her previous marriage the sum of M.100,000 reducible to a lesser sum in certain events as therein mentioned, now I hereby confirm such obligation and direct my trustees to fulfil such obligation should I die before it has been fulfilled.

The testator died on Oct. 10, 1922.

Lionel Cohen, K.C., and *J. W. Scobell Armstrong*, for the plaintiffs.

F. K. Archer, K.C., and *A. J. Belsham*, for the defendant Antoinette L. Schnapper.

D. Ll. Jenkins, for the defendants, Blanca Morel, Nelly Clara Lautenberg, and Max Morel.

J. H. Carlile Morris for the defendant, Clara Oppenheimer.

F. R. Evershed, K.C., and *H. S. G. Buckmaster*, for the defendant, Edith Betty Schnapper.

The defendant, Eric Schnapper, was not represented.

J. W. Scobell Armstrong stated that it was a question as to whether the agreement was valid or not. If not, then the question arose as to whether the defendant, Edith Betty Schnapper, took under the will and if so, a

question of valorisation would arise. [He referred to *Re Chesterman's Trusts*, *Mott* v. *Browning* (1); *Peyrae* v. *Wilkinson* (2); *Société des Hôtels Le Touquet-Paris-Plage* v. *Cummings* (3).]

Three German lawyers, *Dr. Cohn*, *Dr. Gottschalk* (also of the English Bar), and *Dr. Victor Lehmann*, gave evidence as to the figure the German courts would award and the factors which, in their respective views, would be considered.

Clauson, J.: This case arises out of the currency difficulties which have affected Germany and England during the last few years. There is no question of principle arising here at all. What I have to deal with is in substance a question of fact. It involves questions of German law which are questions of fact in this court. I have had the assistance of three gentlemen of experience in matters of German law.

The circumstances are these: a testator, Siegmund Alfred Schnapper, of German nationality, was, in the year 1911, living in London and carrying on business as a stockbroker. He subsequently became naturalised, but he was a German subject at that time. It appears that his mother died and, as a result of her death, certain family property was redistributed. The testator had to consider the position of certain of the next generation who had not been sufficiently provided for. There was a document executed in Frankfort, in Mar., 1911, by the testator and by his brothers and sisters, and by that document certain female members of the next generation of the family were made gifts on their attaining the age of twenty-five. It was said that the document amounted to a deed of family arrangement. I have considered the meaning of the document as a question of construction. I have before me an agreed translation and I am quite satisfied it means nothing of the kind. It is simply a record—a record which every member of the family would regard with the highest sanctity—of what various members of the family propose to give, as donations, to junior members of the family. But the element of family arrangement seems to be entirely absent. It is simply a question of record. It is suggested that if one did not carry out the intentions indicated on his behalf, then it is implied that others would be released. I see no trace of that at all. It appears to me to be simply a record of what the members of the family proposed to do.

As regards German law, the evidence is quite clear as to the character the document bears. It is not enforceable in a German court as a legally binding document and the evidence of the German lawyers is all that way. It is now suggested that the German courts might put some other construction upon the document, but I am not satisfied, upon the weight of evidence, that they would. In my opinion, in 1911, the testator executed this document of donation and promised to give to his niece Edith Betty Schnapper, M.100,000 on her marriage, or on her

twenty-fifth birthday. She attained the age of twenty-five on Oct. 31, 1934.

Between 1911 and 1922 many things happened. On June 25, 1922, Mr. Siegmund Schnapper, who was then unquestionably domiciled in England and at that time a naturalised Englishman, made his will and referred to the matter in these terms [His Lordship read the words of the will]. Did the document to which he referred create a binding obligation? The testator died on Oct. 10, 1922. At that date the currency mark remained what it had been in 1911. As to its value, I say nothing. Since that date there have been changes in this respect. In 1923, a unit of currency known as the rentenmark was substituted for the old mark, and in 1924 a unit of currency known as the reichsmark was substituted for the rentenmark. Miss Edith Betty Schnapper, having attained the age of twenty-five on Oct. 31, 1934, the trustees have now come to the court to ask for directions as to what sum is to be paid to the lady in these circumstances. I have before me those who represent the residue and also other parties, but nobody has been bold enough to argue that the sum payable in respect of this gift should be less than £5,000. The position is perfectly clear. As I understand the evidence of the German lawyers, at one time the German courts said that the strict law was that debts expressed in marks of the old currency were not to be re-evaluated at all, and in fact, the Supreme Court declined to re-evaluate them. Difficulties arose in practice and eventually the court came to its present practice and re-valued the mark, according to article 242 of the German Civil Code, which reads:

> The debtor is bound to effect the performance of his obligation according to the requirements of good faith, ordinary usage being taken into consideration.

On the foundation of that article, a practice has been adopted by the German courts, under which, when a question arises as to what a creditor, who is a creditor for a sum in the old currency, is entitled, the court makes an order for the payment of that sum which, according to all the circumstances of the case, having regard to the comparative purchasing power of the mark, and the question as to whether the creditor and debtor respectively have become more prosperous or less prosperous since the time the obligation was undertaken, and all other circumstances which the Judge thinks to be material to the requirements of good faith, ordinary usage being taken into consideration, thinks to be the right thing. I gather that certain principles are more or less adopted in practice. I have had evidence on the matter from the German lawyers and two of the three are reasonably clear that, having regard to all the circumstances of the case, if the matter came before the German court as to what would be payable on the assumption that the court would enforce the donation the court would come to the conclusion that the

right figure would be approximately £5,000. The trustees obtained the opinion of Dr. Cohn and that was his conclusion. Dr. Gottschalk, who gave evidence on behalf of others interested, was disposed at one time to think the court would fix a somewhat lower sum and that it would be about £4,000. But as he said in the box, after being further acquainted with the circumstances, he could not see his way to disagree with Dr. Cohn that the sum would be towards £5,000, which a German court would consider the right sum. Dr. Lehmann, who was called on behalf of the legatee, was disposed to take a higher sum, and thought it possible that the court might adopt a sum at so high a figure as £8,000. But counsel for the legatee was not disposed to put it so high and suggested that the right figure would be something between £5,000 and £8,000. Dr. Lehmann was inclined to take a more sanguine view. But I find as a fact that the German court, acting according to German law, if it had to value the obligation treated as a binding obligation, would put the figure at approximately £5,000. What is my function on that state of facts ? I do not read the will of the testator as being a bequest of M.100,000. It has been said that it ought to be so construed. It does not seem to me to be a true construction. On the true construction, it appears to me that the direction given to the executors is to make such payment by way of legacy if necessary—that is to say, if the document of 1911 is not legally enforceable, to make such payment by way of legacy as would give Edith Betty Schnapper a sum which he would have had to give her had it been so. In these circumstances, I propose to deal with the matter in this way. I make a declaration that Miss Edith Betty Schnapper is entitled to a decree as a legatee under the will in respect of a sum of £5,000 to be paid to her on Oct. 31, 1934. The result will be that she is entitled to that sum with interest from that date, and she is entitled to that payment as a legatee under clause 13 of the will.

Costs of all parties were ordered to be paid out of the estate.

Solicitors : *Adler & Perowne* (for the plaintiffs, and for the defendant, Antoinette L. Schnapper) ; *Herbert Oppenheimer, Nathan, Vandyk & Mackay* (for the defendants, Blanca Morel, Nelly Clara Lautenberg, Max Morel and Edith Betty Schnapper) ; *Linklaters & Paines* (for the defendant, Clara Oppenheimer).

[*Reported by* W. K. Scrivener Esq., *Barrister-at-Law.*]

Re WALSH, DECD., PUBLIC TRUSTEE *v.* WALSH.

[COURT OF APPEAL (Slesser, Romer, and Greene, L.J.J.), **March 4, 1936.**]

Will—Distribution of property according to Statutes of Distribution as on intestacy—Settlement and will made before, and testatrix's death after, Jan. 1, 1926—*Administration of Estates Act*, 1925 (c. 23) *s.* 50 (2)—*Contrary intention.*

By a settlement dated Mar. 19, 1924, Miss W. gave certain property to the Public Trustee upon trust to divide a part thereof among "such persons being next of kin of the settlor at the date of her death according to and in such manner and proportions as are prescribed by the Statutes of Distribution as if the settlor died unmarried and intestate and as if the whole of the trust fund was personal estate." By her will made on the same day Miss W. gave all her estate not disposed of by the settlement to the Public Trustee "upon the like trusts and to and for the like ends intents and purposes and with the like powers and provisions applicable thereto as are declared by and contained in the said indenture of settlement with regard to the trust premises settled thereby after my death shall have occurred." Miss W. died in 1929:—

HELD: the trust funds under both the settlement and the will must be administered according to the law of intestacy in force at the date of the settlement.

[**EDITORIAL NOTE.** It seems a little peculiar that once there is a decision upon one particular provision of the Property Legislation of 1925, it is not long before there are several more upon the same section, while other sections, many of them of particular interest, have not yet become the subject of authority. The present case deals with the construction of the Administration of Estates Act, 1925, s. 50 upon which there have already been three reported decisions. The present case is in a way of a negative value since it rejects a careful and thoughtful argument upon the part of the respondent. Without any disrespect to the propounders of such thoughtful arguments, one can feel well satisfied that the statute is to have its plain and ordinary meaning and we are not to be concerned with all the learning and difficulties as to the retrospective operation of statutes.

FOR THE LAW, see HALSBURY, Hailsham Edn., Vol. 10, pp. 593, 594, para. 858, and FOR THE CASES, see DIGEST Supp.. FOR THE ADMINISTRATION OF ESTATES ACT, 1925, s. 50, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 8, p. 353.]

Cases referred to:

(1) *Re North, Meates* v. *Bishop* (1897), 76 L.T. 186; 40 Digest 566, *1048.*
(2) *Re Beaumont, Bradshaw* v. *Packer*, [1913] 1 Ch. 325; 40 Digest 517, *617.*
(3) *Trew* v. *Perpetual Trustee Co.*, [1895] A.C. 264; 43 Digest 607, *525.*
(4) *Hasluck* v. *Pedley* (1874), L.R. 19 Eq. 271; 44 Digest 536, *3521.*
(5) *Croxford* v. *Universal Insurance Co., Ltd*, [1936] 1 All E.R. 151.
(6) *Norman* v. *Gresham Fire and Accident Insurance Society, Ltd.*, [1936] 1 All E.R. 151.
(7) *In the Goods of Pewtner* (1846), 4 Notes of Cases, 479; 44 Digest 238, *636.*
(8) *Sheldon* v. *Sheldon* (1844), 1 Rob. Eccl. 81; 44 Digest 237, *628.*
(9) *In the Goods of Sibthorp* (1866), L. R. 1 P. & D. 106; 23 Digest 138, *1374.*

APPEAL from an Order of the Vice-Chancellor of the Chancery of the

County Palatine of Lancaster (Sir Courthope Wilson, K.C.), made at Manchester on July 22, 1935.

Miss Sarah Alice Walsh by a settlement dated Mar. 19, 1924, gave property to the Public Trustee on trust to pay her the income of the fund for life, and after her death to discharge her debts and then pay one-quarter of the residue to a certain relative and thereafter to divide the remainder into four parts, distributing one of these parts among

Such persons being next of kin of the settlor at the date of her death according to and in such manner and proportions as are prescribed by the Statutes of Distribution as if the settlor died unmarried and intestate and as if the whole of the trust fund was personal estate.

By her will dated the same day as the settlement, Miss Walsh gave the remainder of her estate not disposed of by the above settlement to the Public Trustee :

Upon the like trusts and to and for the like ends intents and purposes and with the like powers and provisions applicable thereto as are declared by and contained in the said indenture of settlement with regard to the trust premises settled thereby after my death shall have occurred,

and appointed him sole executor and trustee of the will.

Miss Walsh died on Mar. 21, 1929, and the Public Trustee moved the court to order the Registrar to make an inquiry. On July 21, 1930, the court ordered an inquiry :

Who upon the death of the said Sarah Alice Walsh would have become beneficially entitled to any property of hers if she had died intestate and for what estates and interests and in what shares and proportions and whether any such persons are since dead and if they have since died and would have been entitled to any vested share or interest upon such intestacy who are their legal personal representatives.

In taking the inquiry it became apparent that the persons beneficially entitled could not be ascertained until the question had been decided, as a matter of law and upon the true construction of the settlement and the will, whether they were to be ascertained according to the law of intestacy as it stood before Jan. 1, 1926. or after that date. The Public Trustee on July 12, 1935, presented a petition to determine that question.

The petition was heard on July 22, 1935, before the Vice-Chancellor, Sir Courthope Wilson, K.C., who decided that the new law applied. He considered that, as the settlement and the will were both to be treated as the will, and probate was granted of both documents, the testatrix must have intended to dispose of her property in favour of the persons entitled under the Statutes of Distribution in force at the time of her death, whenever it occurred. This was, he held, a " contrary intention " which appeared by her will (including the settlement) and therefore took it out of the provisions of the Administration of Estates Act, 1925, s. 50 (2).

The legal personal representatives of a first cousin, Mrs. Emma Clara Martin, whose estate would have benefited to a greater extent under the old law than under the new law appealed.

Cyril Radcliffe, *K.C.*, and *G. A. Rink*, for the appellants.

Sir Gerald Hurst, *K.C.*, and *George Maddocks*, for the respondents.

Allan Walmsley, for the Public Trustee.

Radcliffe, *K.C.*: The Administration of Estates Act, 1925, s. 50 (2), obviously applies to this case; there is no contrary intention to be found in the settlement. In its terms the settlement clearly refers to the law as it existed at the date of execution. The will makes no reference to statutory next of kin or the Statutes of Distribution; it intends the property to go upon the same trusts as those of the settlement.

Sir Gerald Hurst, *K.C.*: It is agreed that the intention of the testatrix was that the funds disposed of by the settlement and the will should go to the same destination, but in this case the will attracts the settlement, and not the settlement the will, and the new law must apply. Even if sect. 50 (1) did not exist, the ordinary principle of construction will apply; that where a will contains a reference to trusts declared in another document, the court will read into the will the like trusts (*Re North* (1)). Here the will and the settlement are independent dispositions and the ordinary rule applies: the court should read into the will the trusts of the settlement. In *Re Beaumont* (2) the argument turned on whether the fund given by the will was an accretion to the settlement fund or an independent fund. At p. 327, FARWELL, J., referred to the words of LORD HOBHOUSE in *Trew* v. *Perpetual Trustee Co.* (3):

> Where there is a trust by reference "the only safe course to adopt is to re-write the words declaring such trust, merely substituting the second fund or property for the first".

The phrase "Statutes of Distribution" is a wide and compendious one, and must be taken to mean the law of distribution in force at the time of the testatrix's death. In *Hasluck* v. *Pedley* (4), SIR G. JESSEL, M.R., said at p. 273:

> It is said that testators make their wills on the supposition that the state of the law will not be altered, and it is contended that this will ought to be construed as it would have been under the old law. The answer to that is, that a testator who knows of an alteration in the law . . . and does not choose to alter his will, must be taken to mean that his will shall take effect according to the new law.

The Administration of Estates Act, 1925, s. 50 (1), applies. The practice of the Probate Court of proving at the same time the will and the trusts that are referred to in the will has the effect of incorporating the relevant passages of the trusts in the will and making them part of the will. As this settlement, being incorporated in the will, becomes

literally a part of the will, therefore it is true to say that there is a reference to the Statutes of Distribution in a will within the terms of sect. 50 (1). There is here a contrary intention within the meaning of sect. 50 (2): it is to be deduced from the circumstances in which the two documents were executed. The funds were to go to the same destination. After the execution of the documents in 1924, while the testatrix was still alive, Parliament passed the Law of Property Act, 1922, which provided for the change in the law enacted by the Administration of Estates Act, 1925, and provided that the change was to come into force on Jan. 1, 1925. This date was subsequently altered to Jan. 1, 1926. The testatrix knew or could have known of the law as laid down in these statutes, and her reference to the Statutes of Distribution in the settlement discloses an intention contrary to sect. 50 (1) of the Act of 1925.

Slesser, L.J.: An enactment cannot be taken to be the law until it comes into force: *Croxford* v. *Universal Insurance Co., Ltd.* (5), *Norman* v. *Gresham Fire & Accident Insurance Society, Ltd.* (6).

Sir Gerald Hurst, K.C.: The ascertainment of the class of persons to be benefited is clearly to take place at a future date.

[He referred to *In the Goods of Peutner* (7), *Sheldon* v. *Sheldon* (8), and *In the Goods of Sibthorp* (9).]

Slesser, L.J.; This appeal succeeds, and really, when the matter is properly considered, in my judgment it presents no difficulty at all. The testatrix made a settlement on Mar. 19, 1924, of her property, to take effect at her death, and on the same day she made a will. [His Lordship read the relevant parts of the will.] I agree with Sir Gerald Hurst that that reference to the "like trusts" directs that in reading this will one must look at the trusts referred to to see what are the like trusts and to and for the like ends intents and purposes and with the like powers and provisions applicable thereto as are declared by and contained in the said indenture of settlement.

When we look at the indenture of settlement, in para. 7, we find these words:

> The Public Trustee shall as soon as conveniently may be after the death of the settlor divide the capital of the remaining three fourth parts of such net residue of the trust fund and as to the above mentioned one fourth part thereof at the death of the said Alice Jane Parker between and amongst such persons—

then follow these critical words—

> being next of kin of the settlor at the date of her death according to and in such manner and proportions as are prescribed by the Statutes of Distribution as if the settlor died unmarried and intestate and as if the whole of the trust fund was personal estate.

On Jan. 1, 1926, there came into force the Administration of Estates Act, 1925, and by sect. 50 (2) it was provided that:

> Trusts declared in an instrument *inter vivos* made, or in a will coming into operation, before the commencement of this Act by reference to the Statutes of Distribution, shall, unless the contrary thereby appears, be construed as referring to the enactments (other than the Intestates' Estates Act, 1890) relating to the distribution of effects of intestates which were in force immediately before the commencement of this Act.

Now this trust was made before the commencement of the Administration of Estates Act, 1925, because it had been made in 1924. Therefore, by this subsection, the language in the settlement "as are prescribed by the Statutes of Distribution" must refer to "the distribution of effects of intestates which were in force immediately before the commencement of this Act." The question which is asked in para. 10 (1) of the petition must be answered, "that the persons entitled to participate under the direction contained in clause 7 thereof and the estates and interests for which and the shares and proportions in which they are entitled to participate are to be ascertained and determined according to the law of intestacy in force at the date of the said settlement, namely the 19th day of March, 1924." So much, therefore, for the settlement.

A similar question is asked about the will, and the answer, in my opinion, must follow the answer which I have made about the settlement. In answer to para. 10 (2) of the petition, it must be determined that upon the true construction of the will the persons entitled to participate are similarly those to be ascertained and determined according to the law of intestacy in force at the date of the settlement, that is, Mar. 19, 1924; for this reason: that the will provides that the property shall be held:

> Upon the like trusts and to and for the like ends intents and purposes and with the like powers and provisions applicable thereto as are declared by and contained in the said indenture of settlement.

In so far as it is declared that the said indenture of settlement must follow the principles of distribution before the 1925 Act, so also must the will follow the same principles of distribution.

It was argued by Sir Gerald Hurst that the will falls within sec. 50 (1) of the Act of 1925, which says that

> References to any Statutes of Distribution . . . in a will coming into operation after the commencement of this Act, shall be construed as references to this Part of this Act

so that the distribution shall be according to the principles laid down in the Act of 1925. He points out that this lady died in 1929, which is the fact. But there is in this will no reference to any Statute of Distribution at all. The only reference is the one to which I have

referred, that the trusts shall be the like trusts as those declared in the indenture of settlement. So the will and the settlement must stand and fall together.

I must, however, in courtesy to the learned Vice-Chancellor, make some reference to his judgment from which I have the misfortune to differ. The reason he appears to give for coming to the contrary conclusion is that, looking at the two documents together and seeing, as he says, that they are both treated in the probate as the will. he comes to the conclusion that :

> The testatrix must have intended to dispose of her property in favour of the persons entitled under the Statutes of Distribution at the date of her death, whenever it occurred.

In the first place, I would observe that, if it is permissible to look at the certificate of the District Registrar in the probate in order to construe a will—a form of information which I should have thought was quite illegitimate—it does not seem to me to have the effect which the learned Vice-Chancellor attaches to it. It is true that in the probate both the will and the settlement are referred to, but the reason for referring to the settlement is, as Sir Gerald Hurst quite rightly points out, because the terms of the settlement are to be read into the will and it is necessary for that purpose to refer to it. But probate is only given on the sum dealt with under the will, and there is no reason at all to say that the probate deals with the settlement as such, but only with the language of the settlement for the purpose of construing the will or part of the will. In any event, I am unable to justify—and I do not think Sir Gerald Hurst has attempted to justify—any reference at all to the certificate of the District Registrar as a means of construing this will. It is a document created by an official on Nov. 5, 1929, long after the will had been executed and the testatrix had died, and it seems to me that, even if it had the meaning which the learned Vice-Chancellor attaches to it, it is not to be regarded as of any importance in this case.

For these reasons, I think this appeal should be allowed.

Romer, L.J., and Greene, L.J., agreed.

Order varied accordingly.

Costs of all parties to be their costs in the action.

Solicitors : *J. Wicking Neal*, for *Day & Son*, St. Ives, Hunts (for the appellants) ; *Bannister, Preston & Co.*, Manchester (for the respondents) ; *Chorlton & Gallaway*, Manchester (for the Public Trustee).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

F. W. WOOLWORTH & CO. LTD. *v.* LAMBERT.

[CHANCERY DIVISION (Clauson, J.) **February 27, 28, March 2, 1936.**]

Landlord and tenant—Improvements—"without licence or consent"—Unreasonable withholding—Offer of reasonable sum as compensation—Landlord and Tenant Act, 1927 (*c.* 36), *s.* 19 (2).

In a lease in which the defendants were the lessors and plaintiffs the lessees, the plaintiffs covenanted, *inter alia*, that they would not make any structural alterations on the premises demised without the previous consent in writing of the landlords, and that they would use, occupy and preserve the premises as a first-class shop. The plaintiffs acquired a lease of a piece of land behind the demised premises and, desiring to erect one large shop over the whole property, they proposed pulling down the back wall of the shop on the demised premises, moving the main staircase and making other material alterations. The defendants refused their consent to the proposed alterations. The plaintiffs then sought a declaration under the Landlord and Tenant Act, 1927, s. 19 (2), that the defendants were not entitled to withhold their consent and that the plaintiffs were entitled without further request for licence or consent to make the proposed alterations: (*a*) undertaking to reinstate the demised premises at the expiration or sooner determination of the term in the condition in which they now are; (*b*) securing the performance of this undertaking by a policy of insurance; and (*c*) paying to the defendants such sum (if any) as the court should deem to be reasonable:—

HELD: (i) if the demised premises were considered alone, the proposed alterations were not an improvement within the Landlord and Tenant Act, 1927, s. 19 (2).

(ii) the defendants' refusal of consent to the proposed alterations was not unreasonable for the following reasons: (*a*) the alterations would convert the shop, in breach of a covenant in the lease, into part of a shop not usable alone; (*b*) the alterations would substantially alter the character of the demised premises; (*c*) the defendants had expressed willingness to give their consent on payment of a sum which would substantially compensate them for loss in the selling value of the demised premises; (*d*) there were considerable difficulties in the way of reinstatement at the end of the term.

(iii) the court can on proper evidence determine whether a sum offered in respect of damages is a reasonable sum, but it has no jurisdiction to direct an enquiry as to what would be a reasonable sum.

[**EDITORIAL NOTE.** This case follows previous decisions upon the Landlord and Tenant Act, 1927, s. 19 (2), in the following respects: (i) It is not essential to the application of the subsection that there shall be a covenant *totidem verbis* against making improvements without licence or consent; but it will be sufficient if there is a covenant which on its fair construction is a covenant not to make alterations or improvements without licence or consent. (ii) While this subsection will apply to a covenant which contains the words "without licence or consent" or which may be fairly construed to contain those words, yet, *semble*, it will not apply to a covenant expressed absolutely and without the words "without licence or consent." It carries these matters a stage further, however, thus: though a reasonable sum be offered by the tenant to compensate the landlord in respect of damage to or diminution in value of the premises, it is not necessarily unreasonable for the landlord to refuse the sum tendered and to withhold his consent, if the effect of the improvements is to cause a breach of another covenant in the lease. In the present

case to allow the improvements to be made would have caused a breach of the covenant to preserve the premises as a first-class shop.

For the Law, see HALSBURY, Hailsham Edn., Vol. 20, pp. 212, 213, para. 231, and for the Cases, see DIGEST Supp. For The Landlord and Tenant Act, 1927, s. 19 (2), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 10, p. 390.]

Cases referred to :

(1) *Balls Bros., Ltd.* v. *Sinclair*, [1931] 2 Ch. 325 ; Digest Supp.

(2) *Lilley & Skinner, Ltd.* v. *Crump* (1929), 73 Sol.Jo. 366 ; Digest Supp.

(3) *Whitley* v. *Stumbles* (1930),.99 L.J.K.B. 518 ; Digest Supp.

Action by F. W. Woolworth & Co., Ltd., the lessees of certain premises in Commercial Road, Bournemouth, against Garnet Ewart Lambert and William Robert Joel Lambert, the landlords, for a declaration that on a proper construction of the lease and in the events which had happened the defendants had unreasonably withheld their consent to the making by the plaintiffs of certain alterations and improvement on the premises, and that the plaintiffs were entitled to make the proposed alterations without further request for licence or consent on the part of the defendants.

The facts and arguments are fully set out in the judgment.

Fergus Morton, K.C., and *S. P. J. Merlin* for the plaintiffs, referred to the following cases : *Balls Bros., Ltd.* v. *Sinclair* (1), *Lilley & Skinner* v. *Crump* (2), *Whitley* v. *Stumbles* (3).

Cyril Radcliffe, K.C., and *Roger Turnbull* for the defendants.

Clauson, J. : By a lease of Feb. 27, 1931, the defendants, two gentlemen named Lambert, being then owners of a property in Commercial Road, Bournemouth, known as Nos. 18 and 20, Commercial Road, demised to the plaintiffs their property for a term of forty-two years from Feb. 28, 1931, the term terminating in the year 1973, at a rental of £3,500, rising to £3,750. The property is, as I am told, in a very good if not the best commercial position in Bournemouth. The lease contained a covenant that the lessees will " not without the previous consent in writing of the lessors erect or suffer to be erected any other building upon the said demised premises nor to make or suffer to be made any structural alterations in or additions to the demised premises except that they may carry out such alterations " which had been agreed to before the lease about which no question arises with a proviso " that in the event of the lessee company making with the consent and approval of the lessors any further additions, alterations " and so forth " of the demised premises at any time during the said term no fine or premium or increase of rent will be demanded for such consent and approval."

The property in question had consisted of two shops. By the time this lease was granted, I think I am right in saying that the two shops were moulded into one shop. It is material that I should mention that in sub-clause 11 of clause 2 of the lease, there is a covenant by the lessees

"to use occupy and preserve the demised premises as a first-class shop suited to the neighbourhood . . . and at all times of the year during the usual business hours of the locality to keep the demised premises open as a first-class shop or shops," and tnen "but nothing contained in this lease shall prevent the lessee company from carrying on its business on the demised premises as now carried on at its other branches." There is also a covenant in sub-clause 12 of clause 2 "not to commit or suffer to be committed any waste spoil or destruction on the demised premises." At the time the lease was granted and at the present moment the property is laid out as a shop with various staircases, lavatory accommodation, and so forth, necessary for carrying on the shop in accordance with the best practice of shopkeeping, and in accordance to some extent with various regulations which affect shops as regards the provision of accommodation for shop assistants, and so forth.

The plaintiffs have acquired a tenancy of a piece of land at the back of the demised premises, and they desire to pull down the back wall of the shop on the demised premises and to open up the demised premises so as to join to the piece of land of which they have obtained the tenancy at the back of these premises. They are going to make alterations of this character. The back wall of the demised premises having been pulled down, and at a particular point the side wall having been, so to speak, pressed out over the adjoining property, which belongs to still a third ground landlord, they propose to erect over the whole combined property one large shop. Among the alterations are alterations of this character, that the existing main staircase in the existing shop on the demised premises will be moved away, only one small staircase being left on the demised premises, a staircase obviously insufficient for the user of the demised premises as a self-contained shop. There are other incidental changes such as, for instance, that lavatories and staff accommodation, and so forth, are going to be moved so that when the alterations are made, instead of the demised premises being occupied by a shop they will form part of a large shop extending over the demised premises, plus the ground at the back. I may say at once that the change, according to all the evidence, will unquestionably be for the benefit of the plaintiffs in this sense, that they will have a much larger shop in which they will have greater facilities for carrying on the business which they conduct. But it is not disputed (and there is no possible doubt) that the structure which when the alterations are made is left upon the demised premises will be not a shop, but a fragment of a shop, not usable alone in the condition in which it will then be. It is not usable alone if only because of the absence of the right to staircase accommodation and the absence of lavatory accommodation and so forth. So far as the lease is concerned, it is plain that the alterations are alterations of a character which cannot be made without committing a breach of the

covenant which I have read. It will be observed that while the words "without the previous consent in writing of the lessors" are unquestionably attached to the covenant not to erect or suffer to be erected any other building, it is not quite plain that those words "without the previous consent in writing of the lessors" are necessarily to be read into the covenant not to make or suffer to be made any structural alterations. But having regard to the clause as a whole and giving a somewhat benevolent construction to it, I am prepared for the purposes of this case to assume that the true construction of the document is that it contains a covenant that the lessees will not without the consent in writing of the lessors make or suffer to be made any structural alterations to the demised premises.

If the matter stopped there, of course it would be obvious that the alterations could not be made without the lessors' consent, a consent which they are not willing to give. The plaintiffs, however, point out that the matter does not rest there, but that the Legislature has interfered by the Landlord and Tenant Act of 1927. Under sect. 19 (2), the side-note of which is "Provisions as to covenants restricting the making of improvements," the Legislature has enacted that in all the leases whether made before or after the commencement of this Act containing a covenant, condition or agreement against making improvements without licence or consent such covenant, condition or agreement shall be deemed, notwithstanding any express condition to the contrary, to be subject to the proviso that such licence or consent is not to be unreasonably withheld, and they say that the effect of that is that the defendants' consent to these proposed alterations is not to be unreasonably withheld. The first comment to be made is this. I have not actually got in this lease a covenant *totidem verbis* against the making of improvements without licence or consent. A similar difficulty arose in the case before my brother Luxmoore of *Balls Bros., Ltd.* v. *Sinclair* (1). The effect of that decision so far as I am concerned with it may, I think, be stated in this way, that it is not essential to the application of this section that there should be a covenant *totidem verbis* against making improvements without licence or consent, but that it will be sufficient if there is a covenant which on its fair construction is a covenant not to make an alteration, including alterations of the nature of improvements, without licence or consent. Having regard to my brother Luxmoore's judgment in that case I say no more about it. I follow with respectful agreement his decision in that regard. There is, however, this rather curious point. It appears to be agreed by counsel in this case—and their agreement seems to be justified by a decision of Rowlatt, J., in the case of *Lilley & Skinner Limited* v. *Crump* (2), that while this subsection with which I am dealing will apply to a covenant which contains the words "without licence or consent," it

would not apply to a covenant expressed absolutely and without the words "without licence or consent." It is curious that it should be so, because, of course, if it is so in future leases a lessor who desires to be outside this subsection has nothing in the world to do except to insist on the omission of the words "without licence or consent," which will not in the least prevent his giving a licence or consent to a breach of covenant expressed in general terms. However, in this particular case, as I say, I am prepared to assume, though there is a little difficulty in the grammatical construction of it, that the covenant against alterations which I must read, having regard to what my brother LUXMOORE has stated, as a covenant against alterations, including alterations which are in the nature of improvement, is not to be read as an absolute covenant, but as a covenant which sufficiently indicates that the words "without licence or consent" shall apply. Accordingly so far the subsection seems to apply.

The next question which arises is this. There can be no question that if the section is to apply the alteration in question must be an alteration which may be properly described in the language of the Act as being an improvement. It is on that question that the real importance of this case depends, for here it will be observed that although there is not the least doubt that it will be for the benefit of the plaintiffs as tenants of this and the adjoining property that the alterations should be made, the question of course arises whether this alteration can be said to be an improvement of the property. There is authority for the proposition that improvements are to be regarded rather from the tenants' point of view than that of the landlord's, but they must be so regarded, I conceive, from the point of view of the tenants of the demised property It will be observed *qua* the tenants of the demised property the plaintiffs do not obtain an advantage from this improvement. *Qua* tenants of the demised property they become tenants of what has been described, perhaps rather too rhetorically, as an empty shell—they become tenants of a portion of some other thing. I find the greatest difficulty in holding that an alteration which has the result of destroying the self-contained shop upon this property and substituting a fragment of a much larger shop—which, though very valuable when worked in connection with the other fragments of the much larger shop, is *per se* something which is quite valueless—can be said to be an improvement. If the tenants of this shop can no longer use for any reason the part of the shop which is on other premises, they have a thing which they cannot use as a shop at all; it has not the proper staircase, and it has not the various other things which are necessary for its use as a shop. In my view, accordingly, the proposed alteration is not an alteration that is of the nature of an improvement within the meaning of this subsection. On that ground alone, it appears to me that the plaintiffs are not entitled to call

in aid this subsection in order to establish that the defendants are bound not unreasonably to withhold their consent to the proposed alteration.

While I am of that opinion, I think I ought to deal with some further questions which arise in this particular case. Let me assume for the moment that my view is wrong, and that my view gives too narrow an interpretation to the term " improvement " in this section : and let me assume that the work which is proposed to be done can be said to be an improvement within the meaning of this subsection. The question then which I have to face is this : Have the defendants been unreasonable in refusing their consent ? The rest of the section provides this : That the proviso that the licence or consent is not to be unreasonably withheld is to leave it open to the lessor to require payment of a reasonable sum in respect of damage to or diminution in value of the premises, or any neighbouring premises, and any legal or other expenses properly incurred in connection with the licence or consent. There is also a proviso as to the circumstances in which he may require an undertaking on the part of the tenant to reinstate. I do not propose to say more about that part of the section, for throughout it has been recognised by the plaintiffs that, whatever happens, they cannot suggest that the defendants have acted unreasonably in refusing consent unless they, the plaintiffs, are willing not only under the covenant to reinstate, but also to secure the performance of that covenant by a proper insurance policy. If you assume for the moment that some reasonable sum is offered by the plaintiffs, a sum which in the opinion of the court is a reasonable sum in respect of damage to or diminution in value of the premises, it will be observed there is nothing in this section which makes it clear that, if that sum is offered and is refused by the lessors, the lessors will in those circumstances necessarily be acting unreasonably in withholding their licence or consent. In this particular case I am quite clear that, even if a reasonable sum were fixed, and that reasonable sum were tendered, it could still not be said to be unreasonable for the defendants to refuse consent, and for this reason : the lease contains a covenant, which I have already referred to, that the lessee is to use, occupy and preserve the demised premises as a first-class shop ; and is to keep the demised premises open as a first-class shop or shops. Let me assume for the moment that licence and consent are given to the alterations. It is quite clear in my view that the effect of the alteration will be to make it impossible to keep the demised premises open as a first-class shop. On the construction of the document, it seems to me reasonably clear that to use these premises not as a first-class shop, but as a portion of a first-class shop, which extends over other premises, would be a breach of this covenant. How can it be unreasonable for the lessor to refuse his consent to alterations, if when the alterations are made he is entitled to prevent the altered premises being used for the

only purpose obviously for which the alterations are intended to be made? On this ground I should have thought it would be impossible to predicate to the lessors that they were unreasonable in objecting to these alterations being made.

I think, however, the matter may be put a little wider. It appears to me that the section leaves it open to the lessor to consider all the circumstances. A perfectly legitimate circumstance for the lessor to consider, I should have thought, would be that the alterations are alterations of such a character that the thing demised becomes substantially different. Various examples have been given in argument, and I think it was perhaps not conceded, but at all events hardly doubted in argument, that if the nature of the alteration had been to turn this shop into a cinema, let us say, or if the nature of the alteration had been such that the site of the demised premises was to be turned into a great open court and used as a parking place for the purposes of customers who would resort to the new shop at the back—whether it was conceded in argument or not—those would be circumstances which would certainly entitle the lessor to say: "The effect of this alteration is entirely to alter the character of the thing which I own, and out of which I expect to get the rent, or which in future I may wish to sell." I should have thought, accordingly, even apart from the existence of this covenant, if the alterations involve such a crucial change in the nature of the demised premises, that is a circumstance which would justify the lessors in refusing their consent to the proposed alterations. It was rather ingeniously suggested that if I held that the lessor ought to consent to these alterations, that decision of mine would be a ground which would furnish an answer to the lessees, if the lessors, after the alterations had been made, sought to enforce against them this covenant to use the premises as a first-class shop only. The very fact that that argument was put forward does not altogether fail to add some point to the observations that I have already made. However, the difficulties in the way of the plaintiffs do not seem to me to stop there. There is no doubt about this. Whatever the effect of the section may be, the plaintiffs have to establish, in order that they may be allowed to make the alterations, that the consent of the defendants is being unreasonably withheld.

I have had some evidence before me as to the circumstances in which that consent has been withheld. The material circumstances are these. The defendants, being, apparently, quite willing, if they could do so without detriment to their own interests, to do all they could to help their tenants in achieving an object which apparently would be very advantageous to the plaintiffs themselves, consulted responsible advisers, gentlemen qualified by their professional experience and knowledge to advise them as to what would be the effect on the selling value of their

reversion if these alterations were made. They were advised by the two gentlemen who gave evidence before me that the effect upon the selling value would be very material. One gentleman, Mr. Gerald Eve, expressed the view that a sum of £11,000 would be just about the figure to compensate for the diminution in selling value. The other gentleman, Mr. Fox, was not prepared to go quite so far as that. He thought the right figure was about £7,000; and, indeed, it appears that, acting on Mr. Fox's advice, the defendants have expressed their willingness, if £7,000 is paid to them, whatever is the exact legal position, to give their consent to the alterations. Can I hold that consent has been unreasonably withheld when the defendants have merely asked to have paid to them in respect of this transaction a sum which they are advised by competent advisers to be the figure which will substantially compensate them for loss in selling value? I doubt very much if I could hold that they have acted unreasonably. It is suggested that the plaintiffs are entitled to come and ask the court to determine whether some sum less than £7,000 is the reasonable figure; and they have asked for a declaration framed on that footing. Apart from all the other difficulties which I have mentioned, I should feel grave difficulty in dealing with this action on that footing. As I understand, the plaintiffs, in order to get a declaration that they may carry out these alterations without further licence, would have to establish that, having offered a sum which they are prepared to prove to the court and which the court finds to be a reasonable sum, the defendants have refused that reasonable sum. Nothing of that sort has occurred. The plaintiffs' action really seems to be framed on the footing that no sum is payable at all. On the evidence which I have had before me this appears to me to be quite clear, that, whether or not £7,000 is a sum which would adequately replace the diminution in selling value which would be occasioned by this very drastic change in the property, I am quite clear that there would be some diminution in the selling value. It is impossible for me on the evidence as it stands to hold otherwise. It is perfectly true that two expert advisers for the plaintiffs went into the witness box and expressed the view that the thing would sell as well as a fragment of a much larger shop occupied by tenants of such importance as the plaintiffs as it would if it were a separate property. That evidence was contradicted and on the mere weight of evidence I should hesitate to accept that *ipse dixit* of the plaintiffs' advisers as being sufficient. But there is this further. The plaintiffs' advisers gave that evidence, as I understood it, on the footing that there would be no question that the covenant to reinstate insured by an insurance policy in the way that is proposed by the plaintiffs would be adequately carried out. They both of them were prepared to admit, however, if there was any legal difficulty in the way their view might necessarily have to be changed. I am faced by this

position. If the reinstatement is to take place, it means that over thirty years hence, just before the term comes to an end, the plaintiffs or their then successors in title will have, so to speak, to shave off from the total shop the fragment of the shop which is upon the demised premises. The question at once suggested itself as to whether, when that structure has been standing upwards of thirty years, the owner of the adjoining property might not be in a position to raise some difficulty as to support being taken away from the structure on his ground. I do not know whether that may be so or not, but I cannot help thinking that it is by no means so clear as the plaintiffs' expert advisers assume, that effect could be given without any difficulty to the covenant to reinstate. That, however, is a bye matter.

I have stated a number of difficulties which seem to me to lie in the way of the plaintiffs' case. The result of it is that I find it quite impossible either to grant the plaintiffs the declaration that they ask for in the first instance, that "the defendants are not entitled to withhold their consent," nor can I declare: "That in the events which have happened the plaintiffs are entitled without any further request for licence or consent on the part of the defendants and on payment of a reasonable sum to make the improvements." No reasonable sum apparently, as I understand, has been offered by the plaintiffs. That second declaration has been amended, and now a declaration is asked in this form :—

> That in the events which have happened the plaintiffs are entitled to make the said improvements without any further request for licence or consent on the part of the defendants but subject to the plaintiffs: (*a*) undertaking to reinstate the demised premises at the end or sooner determination of the said term in the condition in which they now are; (*b*) securing the performance of the said undertaking by a policy of insurance in an office of repute or in such other manner as this Honourable Court may deem satisfactory; and (*c*) paying to the defendants such sum (if any) as this Honourable Court shall deem to be reasonable in respect of the damage."

It is suggested that I should by decision in this action here and now, apart from other difficulties, direct an inquiry as to what would be a reasonable sum. My answer to that is that, as I read the Act, I cannot find jurisdiction given to this court to conduct such an inquiry. I entirely agree that if the plaintiffs, as part of their case, put forward the contention that £X, which they have offered to pay, or are ready and willing to pay, is a reasonable sum, the court may have, on proper evidence, to determine the issue, aye or no, Is that a reasonable sum? But I feel the gravest doubt as to whether this court would be in a position in such an action as this to direct an enquiry as to what would be a reasonable sum.

However, I need not pursue that matter further, because, having regard to the various difficulties I have stated, I cannot see that any

course is open to me, except to dismiss the action with the usual result that it will be dismissed with costs.

Solicitors : *Lovell, White & King* (for the plaintiffs) ; *Robins, Hay & Waters*, agents for *Lacey & Son*, Bournemouth (for the defendants).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

Re CUTHBERT, *Ex parte* MONNOYER BRITISH CONSTRUCTION CO., LTD, (now Monnobar British Construction Co., Ltd.), By Joseph Stephenson its Liquidator *v.* THE TRUSTEE.

[Chancery Division (Clauson, J.), **February 24, 1936.**]

Bankruptcy—Proof—Agreement not to prove on third party undertaking to pay debt—Bankruptcy of third party.

M.B.C. Co. brought an action against F. claiming repayment of a loan. Before judgment could be obtained, a receiving order was made against F. In consideration of M.B.C. Co. foregoing its right to prove in the bankruptcy of F., C. promised to pay to M.B.C. Co. on demand the amount of the loan. No part of this sum was paid, and M.B.C. Co. obtained judgment against C. in respect of it. A receiving order was then made against C. M.B.C. Co. tendered a proof in the bankruptcy of C., but the trustee rejected it :—

Held : the giving up by M.B.C. Co. of its right to prove in the bankruptcy of F. was good consideration for the promise by C. to pay the amount agreed, and M.B.C. Co. were entitled to prove in the bankruptcy of C.

[**EDITORIAL NOTE.** It may seem strange at first sight that one who has given up his right to prove in one bankruptcy should be let in to prove in a subsequent bankruptcy. Possibly the creditors in the second bankruptcy may feel it a hardship that one who has so foregone his legal remedy should be able to compete with them. It is perfectly clear, however, that there was a good consideration for Cuthbert's promise to pay, and that the debt arising thereunder was a provable one in Cuthbert's bankruptcy. The law does not favour the postponement of creditors otherwise than as the statute provides.

For the Law as to Proof of Debts, see HALSBURY, Hailsham Edn., Vol. 2, p. 262, para. 338 ; and for Cases, see DIGEST, Vol. 4, pp. 252-254, Nos. 2402-2419.]

Cases referred to :—

(1) *Currie* v. *Misa* (1875), L.R. 10 Exch. 153 ; 12 Digest 173, *1274.*

(2) *Re Pilet, Ex p. Toursier & Co. and Berkeley*, [1915] 3 K.B. 519 ; 5 Digest 1124, *9143.*

Appeal by Monnoyer British Construction Co., Ltd. (now Monnobar British Construction Co., Ltd.) from a decision of the Senior Official Receiver and trustee of the property of Arthur Cuthbert, a bankrupt, rejecting a proof of debt made on behalf of the said company in the bankruptcy of the said bankrupt in 1931 for the sum of £551 16*s.* 11*d.*, being as to £500, the amount of a judgment obtained by the company

against the bankrupt in the King's Bench Division on May 21, 1931 and as to £51 16*s.* 11*d.*, the taxed costs of the said judgment.

The company in or about the year 1930 advanced to one Henry Maurice Fisher the sum of £500 by way of loan. In the year 1931 the company commenced proceedings against Fisher claiming repayment of the loan. Before judgment could be obtained, Fisher had a receiving order made against him in the Southend County Court on Jan. 7, 1931. Cuthbert, who was at that time very much interested in Fisher and was arranging to raise moneys on his interests in certain property for the purpose of settling Fisher's debts and the carrying on of a certain business in which Fisher was to join him and in which he would get the benefit of Fisher's connection and experience, wrote and saw the representatives of the company and by a document dated Feb. 7, 1931, addressed to the company and witnessed by Mr. Francis T. Jones, the company's then solicitor, stated that in consideration of the company agreeing at his request not to prove in the bankruptcy of Fisher for the sum of £500, the amount owing by Fisher to the company for money lent, he thereby promised and agreed to pay the company the said sum of £500 and undertook to pay the same on demand at any time after the expiration of six weeks from the date thereof.

Fisher was adjudged bankrupt on Apr. 3, 1931, and Cuthbert, not having paid the sum of £500 or any part thereof to the company, judgment was obtained against him by the company on May 21, 1931, in the King's Bench Division for the said sum of £500 with costs which were taxed at £51 16*s.* 11*d.*

On Oct. 25, 1931, a receiving order was made against Cuthbert in the High Court of Justice in Bankruptcy on a creditor's petition, and on Nov. 27, 1931, he was adjudicated bankrupt. The company proved in the bankruptcy, but the case being a summary one and there being no assets at the time, the proof was not dealt with by the Official Receiver until the end of the year 1935, when certain assets became available for the creditors and the Official Receiver as trustee rejected the proof on the ground that the creditors' claim was under an undertaking given by the bankrupt in respect of a transaction for which no consideration passed from the creditors either to the principal debtor or the bankrupt at the date of the undertaking.

G. F. Kingham, for the appellants: The definition of consideration supplied by the Court of Exchequer Chamber in *Currie* v. *Misa* (1) is that consideration is something done, forborne or suffered or promised to be done, forborne or suffered by the promise in respect of the promise. The creditors had a right to prove in the bankruptcy and by reason of the offer made by Cuthbert to pay their debt provable against the estate of Fisher, they forbore to exercise that right, and thereby, to their detriment, gave up their right to participate in any dividend

declared in the bankruptcy. The giving up of such right was ample consideration for the promise made by Cuthbert to pay the debt owing to them by Fisher.

Tindale Davis, for the respondent: The effect of a receiving order is that a creditor cannot pursue his remedies against his debtor (Bankruptcy Act, 1914, s. 7), and the effect of an adjudication is that in place of the right to enforce his remedies against the debtor and his property the debtor acquires a right to share proportionately in the distribution by the trustee in bankruptcy of the assets which become vested in the trustee. No benefit can, therefore, pass from the promisee to the promisor or to the bankrupt by giving up the right to prove in the bankruptcy. It was not proved that the company had ever made the alleged loan to Fisher. He referred to *Re Pilet, Ex p. Toursier & Co. and Berkeley* (2).

Clauson, J. [His Lordship stated the facts]: The only question which I have to determine in this case is whether the agreement made between Cuthbert and Monnoyer British Construction Co., Ltd., now Monnobar British Construction Co., Ltd., whereby the company agreed to forgo its right to prove in Fisher's bankruptcy in consideration of Cuthbert paying to them the sum of £500, is a valid agreement. Cuthbert had, in fact, got the company to forgo its right to prove in Fisher's bankruptcy in consideration of Cuthbert paying the agreed sum and at that time Cuthbert was arranging to raise moneys on his interests in certain property. Now according to *Currie* v. *Misa* (1), valuable consideration is clearly defined as some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. In my opinion there is no doubt that the giving up by the company of its right to prove in the bankruptcy of Fisher is good consideration for the promise by Cuthbert to pay them the amount agreed. The trustee, therefore, was not justified in rejecting the proof which must be admitted in full. The appeal must be allowed with costs and the costs must be paid by the Official Receiver out of the assets.

Solicitors: *John B. Borer* (for the appellants); *Tarry, Sherlock & King* (for the respondent).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

RELLIE *v.* PYKE.

[CHANCERY DIVISION (Clauson, J.), **February 24, 25, 1936.**]

Specific performance—Assignment of lease—Default by assignor to repair—Entry into possession by assignee.

The plaintiff contracted with the defendant to assign to him the lease of certain property. Under the lease the lessee was required, *inter alia*, to keep a tennis court in good repair. This the plaintiff had not done, and the defendant required an indemnity in respect thereof. The defendant had meanwhile entered into possession. The defendant required the plaintiff to put the court into good order at once; but the plaintiff was only prepared to give an undertaking to do this at the end of the term. The defendant refused to accept this and thereupon vacated the premises, having been in possession about three months. In an action for specific performance the plaintiff contended that the defendant by entering into possession with full knowledge that the covenant had not been observed had waived his right to object to the title:—

HELD: (i) the defendant by entering into possession had not waived his right to require the court to be put in good repair.

(ii) the plaintiff had ample time to put the court in order before the defendant vacated.

(iii) even if the plaintiff now put the court in good repair, he would not be entitled at this late stage to an order for specific performance.

[**EDITORIAL NOTE.** Entry into possession usually operates as a waiver of objections to title and precedent books usually contain a form for use where a person wishes to enter into possession without waiving his right to object to the title. Apart, however, from this express notice to the vendor that objections are not being waived, it is possible by stating the objection upon taking possession, or as soon as the defect is discovered, and continually insisting upon it, to prevent the taking of possession being treated as a waiver. Modern authority of this kind is scarce though the point often arises in practice. The question of the purchaser being compelled to take an indemnity is also an interesting one, but here there is considerable modern authority.

FOR THE LAW ON WAIVER BY TAKING POSSESSION, see HALSBURY, 1st Edn., Vol. 25, pp. 363, 364, para. 621, DIGEST, Vol. 40, pp. 174-176, Nos. 1438-1456, and FOR THE LAW ON FORCING A PURCHASER TO GIVE OR TAKE AN INDEMNITY, see HALSBURY, 1st Edn., Vol. 27, p. 102, para. 178, and FOR THE CASES, see DIGEST, Vol. 42, p. 562, Nos. 1279-1284.]

Cases referred to:

(1) *Re Taunton and West of England Perpetual Benefit Building Society and Roberts' Contract*, [1912] 2 Ch. 381; 40 Digest 131, *1039*.
(2) *Lockharts* v. *Rosen (Bernard) and Co.*, [1922] 1 Ch. 433; 42 Digest 508, *746*.
(3) *Nouaille* v. *Flight* (1844), 7 Beav. 521; 42 Digest 562, *1282*.
(4) *Re Weston and Thomas's Contract*, [1907] 1 Ch. 244; 42 Digest 562, *1283*.
(5) *Green* v. *Sevin* (1879), 13 Ch.D. 589; 42 Digest 586, *1538*.

ACTION for specific performance of a contract, dated May 30, 1935, for the assignment of the lease of property known as Friar's House, George Green.

R. F. Roxburgh, K.C., and *E. J. Heckscher* for the plaintiff.

C. E. Harman, K.C., and *A. J. Belsham* for the defendant.

The facts are set out in the judgment.

Roxburgh, K.C.: By taking possession the defendant waived his right to obtain from the plaintiff an indemnity against his possible liability to the landlord with regard to the covenant to repair the tennis court. [He referred to *Re Taunton and West of England Benefit Building Society and Roberts' Contract* (1); *Lockharts* v. *Rosen (Bernard) & Co.* (2); *Nouaille* v. *Flight* (3); and *Re Weston and Thomas's Contract* (4).]

Harman, K.C.: There was no waiver, but on the other hand when the plaintiff had the opportunity and was asked to do what the defendant was entitled to have done, by his non-feasance he repudiated the contract and the defendant was entitled to vacate the property as he did and he is not liable for specific performance. [He referred to *Green* v. *Sevin* (5).]

Clauson, J.: This is an action brought by Mr. William Rellie against Mr. Pyke, claiming specific performance of a contract, dated May 30, 1935, for the assignment of a lease of a property known as Friar's House, George Green. In May, 1935, Mr. and Mrs. Rellie were living at Friar's House and the lease had approximately two and a-half years to run before expiry. It seems that they were minded to move and wished to find a purchaser, and they came into contact with the defendant, Mr. Pyke, who, in the circumstances of his occupation, was anxious to come nearer to London and was looking for a house. Mrs. Pyke came to see over Friar's House with Mrs. Rellie and went round the grounds, and on June 1 Pyke wrote to the plaintiff agreeing to take the lease at a rent of £100, occupation to be taken over on June 20, 1935. It was also arranged that they should take over certain fittings for a sum of £25, and it was suggested that they should buy a shetland pony and one or two other fixtures and odds and ends.

Letters were exchanged and it appears from the letter of June 11 that the landlord's agents were quite agreeable, and by a letter of June 11 Mr. Pyke asked for the draft assignment. On June 13 Mr. Rellie sent to Mr. Pyke a copy of what was called "particulars of lease," which contained full particulars, setting out the covenants. On June 20 Mrs. Rellie wrote saying that as they now proposed moving in on the 25th, it would be more satisfactory if they paid the £25 for the fittings on or before the 24th, and there was a postscript to the effect that the Rellies had paid the rent due to the landlord up to date.

The solicitors were in communication and appear to have treated the matter as one of some urgency, as if they had in mind the exchange of documents on the following Monday, but what the parties had in mind was that the Pykes should go into possession on the 25th, after completion. On June 26 the defendant's solicitors wrote to the plaintiff's solicitors asking about the tennis court marked on the plan and stating

that Mr. Pyke wanted an assurance that there would be no question of his having to put one up at the expiration of the lease. From the evidence before me with regard to this tennis court, it appears that when Mr. and Mrs. Pyke visited the house they saw beyond the garden, in a sort of rougher field, an old gravel pit filled with sand and gravel and various other kinds of debris, which had been roughly rolled down and evened out. There was some portion of a net surround and there were signs that there had been a net across. It had been used by the Rellie's children, but it was clearly not a properly prepared or marked-out court, nor was it kept in proper order. There was a liability under the lease on the lessee to keep the grounds in order, and the landlord could require the tenant to keep this court in order and to make good any subsidence caused by rains, etc., and the tenant must pay for such dilapidations. It is clear on the evidence before me that the court was rough and overgrown with vegetation, and there are no grounds for the suggestion—nor has it been suggested—that the landlord could require a proper court to be constructed, but there was an obligation to keep the existing court in order, and I am satisfied that a sum of £20 at the outside would have been quite sufficient for this purpose. In this conversation on the occasion of the visit of Mr. and Mrs. Pyke to the house, although comparatively unimportant, the point was raised about the court and there was a suggestion on June 22 to ask the lessor for a letter saying that he would not require the lessee to be responsible for such repairs. On June 22 Mrs. Pyke sent to Mrs. Rellie the £25 for the fittings. The solicitors seemed to have behaved with exemplary dispatch, requiring answers to inquiries by telegram and so forth, but the assignment was not in fact executed on the 24th, but on the 25th, with the assent of Mrs. Rellie, Mrs. Pyke did go into possession. This point about the tennis court having been raised, it has been suggested that because of this entry Mr. Pyke ceased to have the right to be protected against liability with regard to the court, that is to say in technical language that he had waived his right to object to the title on the ground that the covenants had not all been observed up to date. In my view there is no ground whatever for that suggestion. In the letter of June 26 from Mrs. Rellie's solicitors to the defendant's solicitors, it was stated that the lessee must drain the court. In the letter in reply to this, it was pointed out that in the then condition of the court, over-grown with vegetation, there must already have been a serious breach and that the plaintiff must indemnify the defendant. On July 1, Mrs. Rellie wrote to Mrs. Pyke that they would obtain a letter from the landlord indemnifying Mr. Pyke, but such letter was never, of course, in fact obtained. On Aug. 20 the plaintiff's solicitors wrote to the defendant's solicitors that the court would require to be reinstated and that their clients were prepared to give an undertaking to do this, provided the

defendants would undertake not to dig or in any way interfere with the court. On Aug. 22, it was suggested that this system of cross-undertakings was involved and that the best course would be for Mr. Rellie to put the court in order there and then, and if he had only done so, there would have been an end of the matter.

On Aug. 27, the defendant's solicitors asked that before completion, Mr. Rellie should put the court in order and comply with the covenants, which, in my view, they were perfectly entitled to do, and they said that if that were done they would go on, but otherwise they would throw up, and that they were not satisfied with an undertaking.

On Aug. 28, the plaintiff's solicitors replied that they would take their client's instructions and reply in due course, and after that there is silence and nothing further happens until Sept. 26, when there is a letter from the purchaser's solicitors to the vendor's solicitors, in which they say that owing to the uncertainty of the position with regard to the landlord, the purchaser thinks it best that since they will not do what he has asked them to do, he should vacate at once, and he offers payment for the period of time during which he has been in occupation. On Sept. 27, the plaintiff's solicitors wrote to the defendant's solicitors saying that the defendant having agreed to take a lease and an assignment having been executed and the license having been obtained from the landlord, the occupation must be taken to be an acceptance. The court question having been raised after occupation, their client was willing to give an undertaking if required. The defendant's solicitors replied that they had advised their client to move on the morrow and they pointed out that if there had ever been such a covenant, there had already been a serious breach of it. The Pykes then went out of possession.

On Oct. 3, the plaintiff's solicitors wrote to the defendant's solicitors acknowledging receipt of the keys and raising the question of waiver again. They also said that in their opinion their clients had been most generous all along in the way they had behaved with regard to the landlord, and asking the defendant's solicitors to accept service. I may say at this stage that all this arose over a small piece of work which could have been done by two men in a couple of afternoons.

I have referred to the letter of Sept. 26, in which the defendant's solicitors wrote that the best course was for their clients to vacate. It appears that there was a telephone conversation between the plaintiff and the defendant that evening. It is quite clear that the defendant knew of the letter having been written, but it had not then been actually communicated to the plaintiff himself. There has been considerable controversy as to that telephone conversation, but after full consideration of the accounts of it given to me, I am inclined to treat Mr. Pyke's recollection as the more reliable. Mr. Rellie appears to have become

somewhat heated over the matter and no doubt this heat communicated itself over the telephone to the party at the other end and was shared by him. It has been suggested to me that this conversation may have modified the rights of the parties, but I do not agree with this view. The defendant's letter was received and considered by the plaintiff immediately afterwards and during all the correspondence between the respective solicitors there was no mention of the telephone conversation, and I think the court may accept the correspondence and not a conversation of this unsatisfactory kind between two lay clients. It is on the record, but I shall dispose of the matter without relying on it in any way.

The proceedings were then begun and the statement of claim was framed on the footing that the defendant with full knowledge of the covenants of the lease occupied until the 30th, and if there was any breach, which the plaintiff denies, the defendant has waived his right to indemnity. In my view this suggestion of waiver is wrong and Mr. Pyke can claim indemnity. And there being no waiver, what is the position of the parties? In my view the defendant is still entitled to say to the plaintiff "You must deal with the tennis court" and he is not bound to take an undertaking from the plaintiff to do it at the end of the term.

By the letter of Aug. 22, the defendant's solicitors told the plaintiff's solicitors that their client would go on if the plaintiff would do what was required of him, otherwise he would be forced to leave. On Aug. 28, the plaintiff's solicitors say that they were taking their client's instructions and by Sept. 26 there had been quite time enough for the plaintiff to have done what was wanted, but there was no sign. And on Sept. 26 the defendant then writes that in view of the uncertainty with regard to the landlord, he has decided, much against his wishes, that being in peril he has no alternative but to leave. The answer on the 27th is a plea that the defendant no longer had any right to raise this point about the court and he says that the matter is over, but as an act of grace he will give an undertaking, provided the defendant will not in the meanwhile alter or interfere with the tennis court. I read this letter to mean "you have waived your right to raise this point," but the defendant's answer is: "in any case you have committed a breach and we are entitled to rescind." The position is you have the plaintiff raising this objection of waiver and saying "you are simply refusing to carry out your obligation, and I am entitled to the remedy of specific performance" which, in my view, has failed.

Mr. Roxburgh asked me to consider that the plaintiff had always been willing and that even if he was wrong on the waiver point, he could get specific performance if he put the court in order. In my view he is not entitled to relief on these grounds. It seems to me that the letter of Aug. 26 says quite plainly "unless you will put the matter of the court in order, the matter is at an end and I will go out." I refuse to

accept the view and the authorities put forward with regard to time being of the essence of the contract, that where proper notice has been given, as here, there must be a formal notice of a specified date. He plainly says on Aug. 26, "put it right now or I must vacate." And by Sept. 26 his patience is exhausted and he says he must go. Even then the plaintiff did not avail himself of the opportunity to put the matter right. Clearly he thought the matter *was* right and the undertaking was an offer of grace. My view is that the defendant's view is right and that the plaintiff had ample opportunity of setting the matter right, but failed to do so. The only result is that the action fails and is dismissed with costs.

Solicitors: *C. R. Enever & Co.* (for the plaintiff); *C. Butcher & Simon Burns* (for the defendant).

Reported by Charles E. Eden, Esq., *Barrister-at-Law.*]

COMMISSIONERS FOR LORD HIGH ADMIRAL OF THE UNITED KINGDOM *v.* OWNERS OF M.V. "VALVERDA."

[King's Bench Division (Branson, J.), **February 19, 1936.**]

Shipping—Salvage—His Majesty's Ships—Special agreement—Merchant Shipping Act, 1894 (*c.* 60), *s.* 557—*Merchant Shipping (Salvage) Act*, 1916 (*c.* 41), *s.* 1.

The "Valverda" was disabled and certain Admiralty vessels went to her assistance. As soon as the casualty was reported to the owners of the "Valverda," they entered voluntarily into a salvage agreement with the Admiralty. No distinction was made between the ships taking part in the salvage, of which some were specially equipped for salvage within the Merchant Shipping (Salvage) Act, 1916, s. 1, and others were not. At the arbitration held under the salvage agreement to fix the remuneration payable to the Admiralty, the arbitrator decided that by virtue of the salvage agreement, the Admiralty were entitled to remuneration in respect of all the ships which had assisted in the salvage, and he took into account the services rendered both by the personnel and by the ships themselves. The owners contended (i) that the services rendered by the ships themselves ought not to be taken into account, and (ii) that by reason of the Merchant Shipping Act, 1894, s. 557 (1), the Admiralty were not entitled to remuneration in respect of those ships which were not specially equipped for salvage and that as a matter of public policy no agreement for such remuneration was allowable:—

Held (i) the owners intended all the Admiralty ships to be covered by the salvage agreement, under which, on a proper construction, the services rendered by the ships themselves were rightly taken into account.

(ii) there is nothing in the Merchant Shipping Act, 1894, and no principle of public policy to prevent an agreement being come to which waives the advantage given to the owners of a salvaged ship by sect. 557 (1) of that Act.

[**EDITORIAL NOTE.** Under the Merchant Shipping Act, 1894, s. 557 (1) and the Act next referred to where salvage services are rendered by one of H.M. ships which is not specially equipped for salvage within the Merchant Shipping (Salvage) Act, 1916, "no claim shall be allowed for any loss, damage or risk caused to the

ship . . . or for the use of any stores . . . or for any expense or loss sustained." This is simply an enactment which gives the salvaged ship an advantage when salvage services have been rendered by one of H.M. ships which the owner of the salvaged ship would not have got if that service had been rendered by other vessels, and there is nothing to prevent the owners of a salvaged ship by agreement from making themselves liable for payment. The principle of public policy that nothing shall interfere with freedom of contract unless a statute does so in express words, was, in the learned Judge's view, more important than that as a matter of public policy the Admiralty should be barred from maintaining salvage claims which in the case of other persons would be unquestionably maintainable.

As to Salvage Services by the Royal Forces, see HALSBURY, 1st Edn., Vol. 25, pp. 4, 5, para. 5; and for the Cases, see DIGEST, Vol. 39, pp. 318-322, Nos. 27-95. The statutes referred to appear in HALSBURY'S COMPLETE STATUTES OF ENGLAND as follows:—Merchant Shipping Act, 1894: 18 Statutes 162; Merchant Shipping Salvage Act, 1916: 18 Statutes 585; Public Authorities Protection Act, 1893: 13 Statutes 455.]

Cases referred to:

(1) *The Sarpen*, [1916] P. 306; 39 Digest 317, *9*.
(2) *The Iodine* (1844), 3 Notes of Cases 140; 39 Digest 319, *32*.
(3) *Griffiths* v. *Dudley* (*Earl*) (1882), 9 Q.B.D. 357; 42 Digest 762, *1875*.
(4) *The Alma* (1861), 1 Lush. 378; 39 Digest 320, *47*.
(5) *The Matti*, [1918] P. 314; 39 Digest 316, *1*.
(6) *The Morgana*, [1920] P. 442; Digest Supp.

Special case stated by Sir W. N. Raeburn, K.C., the arbitrator in an arbitration between the Commissioners for the Lord High Admiral of United Kingdom and the Owners of the M.V. "Valverda," raising the question of the right of the Admiralty to remuneration for salvage services rendered by H.M. ships

The "Valverda," an oil-tanker, was on a voyage from Curaçao to Land's End for orders, laden with 13,246 tons of petroleum. On Jan. 21, 1935, a fire occurred in the "Valverda's" engine room and an S O S was sent out. A French steamship and H.M.S. "Frobisher" answered the S O S. The fire was extinguished on Jan. 23, but, as the "Valverda's" engines and steering gear were damaged, it was agreed that H.M.S. "Frobisher" should tow her to Bermuda, some 800 to 900 miles away. On the evening of Jan. 23 the owners were informed of the casualty and communicated with the Admiralty. On Jan. 25 they made a salvage agreement on the Admiralty Standard Form of Salvage Agreement. Sect. 1 of the agreement provided:

> The Admiralty agree to use such endeavours as they or their officers may in their absolute discretion think fit to salvage or assist the ship "Valverda" and her cargo and freight, if any, and the master (or owner) hereby engages the services of the Admiralty for such purposes.

Sect. 3 of the agreement provided that the remuneration under the agreement for any services rendered unless agreed with the Admiralty, be fixed by arbitration in London.

The arbitrator decided as facts (i) that this agreement was entered into voluntarily by the owners of the "Valverda," and with full knowledge that H.M.S. "Frobisher" and H.M.S. "Guardian" were then assisting the "Valverda"; and (ii) that the owners did not suggest that any distinction should be made between the classes of Admiralty ships which might take part in the salvage service. The "Valverda" was towed for some 900 miles, and the arbitrator found that the salvage services were dangerous and involved serious risk to the salving ships and to their personnel.

Of the Admiralty vessels, "Sandboy" and "Creole" were ships specially equipped for salvage within the Merchant Shipping (Salvage) Act, 1916, s. 1; "Frobisher," "Guardian," and "Orangeleaf" were not within the section.

The arbitrator decided that, by virtue of the agreement, the Lords Commissioners of the Admiralty were entitled to remuneration of £11,000 in respect of all five ships; but that, if the court held as a point of law that the Lords Commissioners were not entitled to claim in respect of "Frobisher," "Guardian," and "Orangeleaf," they were entitled to remuneration of £6,500.

The owners of the "Valverda" appealed.

K. S. Carpmael, K.C., and *H. G. Willmer* for the appellants.

Sir Thomas Inskip, K.C., A.-G., G. St. C. Pilcher, K.C., and *Norman Craig* for the respondents.

Carpmael, K.C.: No claim can stand for salvage services in respect of vessels which are neither tugs nor ships specially equipped with salvage plant: Merchant Shipping Act, 1894, s. 557 (1); Merchant Shipping (Salvage) Act, 1916, s. 1.

He quoted the King's Regulations and Admiralty Instructions, and referred to *The Alma* (4), *The Sarpen* (1), *The Matti* (5), *The Morgana* (6).

Pilcher, K.C.: Two points arise for decision: (1) whether, on the assumption that the law does not allow the Admiralty to recover payment for salvage services, an express contract can be entered into contracting out of the general position; and (ii) whether in fact the law does prohibit claims for salvage services by the Admiralty.

As to (i) parties can always contract out of an Act of Parliament unless the Act prohibits this (as does the Workmen's Compensation Act, 1925, s. 1); in this case there is no such prohibition. There is nothing against public policy in rendering salvage services.

As to (ii) the Admiralty can in any event recover in respect of the benefit to the salved property, as this is not one of the subjects excluded by the Merchant Shipping Act, 1894, s. 557 (1).

Branson, J.: This case, in so far as it applies to the Merchant Shipping Act, 1894, raises a new point. [His Lordship stated the facts.] The learned arbitrator, whose duty it was to decide the question sub-

mitted to him, under this agreement awarded a certain salvage to the Lords Commissioners of the Admiralty, basing that upon the assumption that he had to take into consideration not only the services rendered by the personnel of the ships, but also the gear that was consumed, and the fuel that was consumed, and so on; and finding that under the agreement the Admiralty were entitled to salvage on that basis assessed the remuneration at £11,000. Before the learned arbitrator the question was raised as to whether he was to allow not only for the services rendered by the personnel, but also for services rendered by the ships themselves. The learned arbitrator found, however, that, if the Lords Commissioners of the Admiralty were not entitled to claim for the services of "Frobisher," "Guardian," and "Orangeleaf," the amount of the salvage should be reduced to £6,500. The owners of the "Valverda," being dissatisfied with that award, have come to this court.

The first question is whether, upon the true construction of the agreement, supposing it to be an agreement into which it was open for the parties to enter, the learned arbitrator was right or wrong. The only point on which it is contended that he has gone wrong in construction of the agreement is that it is said that the remuneration provided for under that agreement was to be a reasonable amount of salvage; and that the reasonable amount of salvage must be calculated with regard to the fact that under the Merchant Shipping Act, 1894, s. 557 (1):

> no claim shall be made or allowed for any loss, damage or risk thereby caused to such ship, or to the stores, tackle or furniture thereof, or for the use of any stores or other articles belonging to Her Majesty supplied in order to effect the salvage service.

Therefore, the arbitrator, it is contended, was wrong in taking into consideration, as he did, the coals expended and the stores and gear lost in rendering the salvage. It seems to me that that argument begs the question. Treating the agreement as one entered into by parties who were *sui juris*, and construed according to the meaning of the language used without reference to anything else, it seems to me that the arbitrator has arrived at a perfectly correct conclusion. I think that, if the agreement is a good and valid one, it is true that the parties meant it to be applied to the services being rendered by two of H.M. ships, "Frobisher" and "Guardian."

It follows from the fact found by the arbitrator that ships in attendance on the "Valverda" were two of H.M. ships to which the definitions in the Merchant Shipping (Salvage) Act, 1916, did not apply. But it is plain that the owners intended the services rendered by those vessels to be covered by the agreement. If, therefore, the agreement is a valid one, that is, if the parties were *sui juris* and were competent to enter

into it, the owners are bound to pay as it provided, and the award made by the arbitrator is correct.

This brings me to the second question. It is argued that this class of agreement is one which is prohibited under the Merchant Shipping Act, 1894, s. 557, and it is said also that, if it is not in words prohibited, it is shown to be contrary to public policy by that section of that Act. With regard to the actual words of the section they are, so far as they are material, as follows :

> Where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle or furniture or for the use of stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service.

I think that, in order to understaud the section completely, it is necessary to look at the history of the position with regard to salvage services rendered by H.M. ships. That history was stated by Bankes, L.J., in *The Sarpen* (1), at p. 319. The Lord Justice says :

> The rule restricting any claim for salvage by a vessel belonging to His Majesty appears to be of very old standing. It was referred to in the case of *The Iodine* (2) by Dr. Lushington in the year 1884, in the following terms : " Observations have been made in the argument respecting one of Her Majesty's vessels preferring a claim of this nature. I thought that question had long ago been settled ; for from the very earliest date of my experience as an advocate, as far back as 1808, I thought the opinion expressed by Lord Stowell had decided this question. I apprehend that where assistance is rendered by any vessel belonging to Her Majesty, the following principles are to be applied : that where a service is done, and there is personal risk and labour, Her Majesty's officers and seamen are entitled to be rewarded precisely in a similar manner, on the same principles, and in the same degree, as where any other persons render that service. But, with regard to the use of the vessel, a different consideration would apply, and a less remuneration would always be made, on account of the vessel being the property of the country, and the property of owners under these circumstances never being risked." Ten years later the rule as extended was incorporated in the Merchant Shipping Act, 1854, ss. 484, 485, and is now to be found in the Merchant Shipping Act, 1894, s. 557.

The Lord Justice has completely expressed the position that in fact the Merchant Shipping Act, 1894, s. 557, which now represents the Act of 1853, does not debar every claim, but simply says that certain matters shall not be taken into consideration in claims. It seems to me to be pushing matters to quite an impossible extreme to say that where a statute which does not actually bar all claims on behalf of H.M. ships, but only says that certain points should not be considered in assessing them, it has set up some doctrine of public policy which prohibits any persons from entering into an agreement to contract out of it ; or, to put it in a more apposite way, prohibits people from contracting so as to take on liabilities which without such a contract they would not under that section be obliged to shoulder.

Public policy is said to be a difficult horse to ride, and when one gets questions in which public policy is concerned, it is necessary to ride warily. It has been said to be a cardinal principle of public policy that the freedom of contract between persons *sui juris* should not be held to be interfered with unless a statute does so in express and unequivocal terms. That, at all events, is a doctrine of public policy as to which there can be no doubt; and I am asked if it is true to say that the Merchant Shipping Act, 1894, involves any question of public policy at all, which of these two principles is to give way? If it can be said that any question of public policy is involved here at all, I think it is more important that the cardinal principle should be maintained than that the Admiralty should be barred from maintaining salvage claims which in the case of other persons would be maintainable. But I do not think that sect. 557 involves any question of public policy at all. It is simply an enactment which gives the salvaged ship an advantage when salvage services have been rendered by one of H.M. ships which the owner of the salvaged ship would not have got if that service had been rendered by other vessels. That is an advantage that anyone may resign by contract. It seems to me quite clear that in the present case the parties have contracted that that advantage should not accrue to the owners of the "Valverda."

The only matter which has been made a little difficult in this case has been the fact that in sect. 557 of the Act of 1894, the language used would seem to indicate a direction to the tribunal to disallow these particular claims. Consideration of the matter has satisfied me that it would be wrong to regard this as imposing a duty upon the tribunal in favour of one party that that party could not waive by agreement.

The Public Authorities Protection Act, 1893, s. 1, has language just as positive as anything in the Merchant Shipping Act, 1894, s. 557; and yet in that statute and other statutes exactly similar language has been construed as giving a right which the one party may insist upon if he likes, but which he may equally waive if he likes. An apposite case is *Griffiths* v. *Dudley* (*Earl*) (3).

The suggestion that it would be against public policy to make such a contract as that made in this case is a myth based on no authority. If a person likes to contract that the Admiralty shall use a warship to salvage and shall be paid a reasonable sum in remuneration, there is nothing to which objection can be taken.

The learned arbitrator was right in the view that he took, and the award must stand.

Solicitors: *William A. Crump & Son* (for the appellants); *The Treasury Solicitor* (for the respondents).

[*Reported by* FRANK ROWE, ESQ., *Barrister-at-Law.*]

HEM SINGH *v.* MAHANT BASANT DAS.

[Privy Council (Lord Alness, Sir John Wallis and Sir George Rankin), **January 23, 1936.**]

Appeals to Privy Council—Right of appeal—Decision of Court of Appeal—Jurisdiction conferred upon Court of Appeal by special Act.

An Act gave power to a tribunal set up thereunder to decide questions which in substance concern the nature of the trusts under which the endowments of certain religious institutions are held. They also include questions of compensation for loss of office and questions as regards claims to property in respect of which the tribunal's powers are not limited by any provisions as to value. Under the Act the tribunal is given the same powers as are vested in the ordinary courts of the country, and its proceedings are to be conducted in accordance with the ordinary rules of civil procedure of the country. The formal expression of its decision is described by the Act as a decree or order. The Act, however, provides that appeals from the tribunal are to be heard by a Division Court and not by a single judge.

On a preliminary objection taken to the competency of the appeal :—

Held : the jurisdiction conferred upon the High Court was intended to include the new subject-matter as part of the ordinary appellate jurisdiction of the High Court, and the case was within the general principle laid down by Viscount Haldane, L.C. in *National Telephone Co., Ltd.*, v. *Postmaster-General*, [1913] A.C. 546, at page 552, that "when a question is stated to be referred to an established court without more, it . . . imports that the ordinary incidents of the procedure of that court are to attach, and also that any general right of appeal from its decisions likewise attaches," and the objection could not be sustained.

[**EDITORIAL NOTE.** The right to appeal to the King in Council exists from the highest court of each separate Dominion, colony, province, state or possession, where the court has been exercising its ordinary jurisdiction. Except in those cases where it has been surrendered, this is a prerogative right, which has in most cases been defined and regulated. In India this has been done by statute (Indian Code of Civil Procedure Act, V of 1908) and in regard to the six High Courts by the Letters Patent constituting those Courts (in the present case the Letters Patent of the Lahore High Court, S.R.O. 1919, No. 364). Where a person or body of persons has been constituted arbitrator for some special reference and appeal has been expressly excluded, the Privy Council has, of course, no right to hear an appeal, notwithstanding that the person or body so constituted, is in other matters a court from which appeal normally lies to the Privy Council (*A.-G. of Nova Scotia* v. *Gregory* (1886), 11 App. Cas. 229). In the present case appeals from a special tribunal were to a Division Court of the Lahore High Court, but in the Act constituting the special tribunal no further right of appeal was included. The Privy Council decided that the jurisdiction conferred upon the Division Court was not in the nature of a special reference, but that it was intended to include the new subject matter as part of the ordinary appellate jurisdiction of the court. Appeal to the Privy Council in a proper case would therefore lie.

As to Appeals to the Privy Council, see HALSBURY, Hailsham Edn., Vol. 8, pp. 552-556, paras. 1220-1222 and Vol. 11, pp. 221-237, paras. 425-454 ; and for the Cases, see DIGEST, Vol. 17, p. 476.]

Cases referred to :

(1) *National Telephone Co., Ltd.*, v. *Postmaster-General*, [1913] A.C. 546 ; 16 Digest 132, *303.*

(2) *Rangoon Botatoung Co.* v. *Rangoon Collector* (1912), L.R. 39 Ind. App. 197 ; 17 Digest 500, *640.*

(3) *Secretary of State for India* v. *Chelikani Rama Rao* (1916), L.R. 43 Ind. App. 192 ; 44 Digest, 65, *461.*

(4) *Maung Ba Thaw* v. *Ma Pin* (1934), L.R. 61 Ind. App. 158 ; Digest Supp.

The High Court, having, on appeal, set aside the majority decision of the tribunal set up under the Sikh Gurdwaras Act, 1925 (Punjab Act VIII of 1925), granted a certificate for leave to appeal to His Majesty under the provisions of the ordinary rules of the (Indian) Code of Civil Procedure.

Leslie De Gruyther, *K.C.*, and *V. K. Krishna Menon* for the respondents ;

A. M. Dunne, *K.C.*, and *C. J. Colombos*, for the appellant.

The judgment of their Lordships was delivered by SIR GEORGE RANKIN.

SIR GEORGE RANKIN : These three appeals concern a religious institution in Manak in the Lahore district, and the buildings, lands and other property belonging thereto. The first appeal, No. 10, is brought by the plaintiffs in a suit under the Civil Procedure Code, s. 92 to remove the defendant Basant Das from the office of mahant or custodian of the institution upon the grounds of misconduct and mismanagement. The learned Subordinate Judge found for the plaintiffs and made an order removing Basant Das and appointing another custodian. The High Court at Lahore set aside this decree and dismissed the suit. No question or difficulty arises as to the competence of this appeal, but the defendant, Basant Das, having died since the High Court's decree, the appeal has not been pressed.

Appeals Nos. 108 and 109 are brought from two decrees of the High Court reversing the decision of a tribunal appointed under the Sikh Gurdwaras Act, 1925 (Punjab Act VIII of 1925). The tribunal had enquired under sect. 16 of the Act whether the institution in suit should or should not be declared to be a Sikh Gurdwara, and by a majority had decided in the affirmative. Two appeals were brought from this decision to the High Court by different sets of persons interested in preventing the institution from being dealt with as a Sikh Gurdwara under the Act. The High Court by two decrees dated Jan. 13, 1931, allowed these appeals, set aside the majority decision of the tribunal, and made a declaration that the institution in suit is not a Sikh Gurdwara within the meaning of the Sikh Gurdwaras Act.

Upon application made to the High Court for a certificate that the cases were fit to be taken on appeal to His Majesty in Council, the learned

Judges of the High Court delivered judgments by which they appear to have held that sect. 110 of the Code did not apply to the cases but that a certificate could be given under what they described as the latter portion of clause 29 of the Letters Patent of the Lahore High Court referring apparently to the words " or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid when the said High Court declares that the case is a fit one for appeal to us, &c." They followed up this judgment, however, by signing a certificate in which it was certified " that the case above set forth fulfils in our opinion the requirements of the Indian Code of Civil Procedure Act V of 1908, s. 110, as regards value and nature and is fit for appeal to His Majesty in Council." From these proceedings their Lordships have some difficulty in ascertaining the exact provision of law under which the learned Judges intended to act. It would appear, however, that whether or not they were satisfied that the amount or value of the subject-matter exceeded Rs. 10,000, they were of opinion that the case was otherwise a fit and proper case to be taken on appeal to His Majesty.

Before the Board a preliminary objection was taken by learned counsel for the respondents to the competence of these two appeals. While not disputing the proposition laid down by more than one of the learned Judges who took part in the decision of the *National Telephone Co., Ltd.*, v. *Postmaster - General* (1) that " when a question is stated to referred to an established court without more, it . . . imports that the ordinary incidents of the procedure of that court are to attach, and also that any general right of appeal from its decisions likewise attaches " (per Viscount Haldane, L.C. at p. 552), learned counsel contended that an examination of the Sikh Gurdwaras Act discloses that the present case is not within this general principle. He submitted that it is governed by *Rangoon Botatoung Co.* v. *Rangoon Collector* (2), and that the principle to be applied to it is that the tribunal were exercising a special jurisdiction ; that the right of appeal to the High Court conferred by sect. 34 of the Act gave to the High Court a special jurisdiction ; and that the decree of the High Court, not being made in the course of its ordinary jurisdiction, the provisions of sects. 109 and 110 of the Code do not apply to confer a further right of appeal on any party. In support of the preliminary objection it was pointed out that by the provisions of sects. 34 (2), 36 and 37 the decision of a tribunal under the Act was very specially protected from interference ; that sect. 34 (3) provides that an appeal preferred under the section shall be heard by a Division Court of the High Court ; and that by sect. 37 any order passed on appeal from a tribunal is given a special efficacy analogous to the effect of an order *in rem*, all courts being prohibited from doing anything inconsistent therewith. It was further contended that the kind of question with which under sect. 16 of the Act the tribunal was in this case con-

cerned—a question as to the religious character of an institution—is of a very special kind ; and that the decision of this question is undertaken merely as a step towards deciding whether or not the institution shall be subjected to the management of certain bodies constituted by the Act, namely, a Committee, a Board, a Judicial Commission. Accordingly their Lordships were pressed to hold that, the Act having given one appeal to the High Court, there is no sufficient basis for an implication that the decision of the High Court is to be subject to the usual incidents as regards a further appeal.

Their Lordships intimated at the hearing that they were not of opinion that the preliminary objection should be sustained. They observe that the tribunal is given by sect. 12 (9) the same powers as are vested in a court by the Code and by 12 (11) its proceedings " so far as may be and subject to the provisions of this Act are to be conducted in accordance with the provisions of the Code." The formal expression of its decision is described by the Act as a decree or order. The matters which may be brought before the tribunal for decision include not only the question whether an institution is a Sikh Gurdwara within the meaning of sect. 16, but include also questions of the amount of compensation to be given to office holders of Gurdwaras on their being superseded in office by the statutory authorities, and the decision of claims made to property which has been included in a list or lists as property belonging to a Sikh Gurdwara. The provision that appeals from the tribunal are to be heard by a Division Court and not by a single judge does not in their Lordships' opinion indicate that the High Court in dealing with such matters would be exercising a special jurisdiction ; nor should any such inference be drawn from the provisions of sect. 37 which is consistent with the view that the jurisdiction conferred upon the High Court by sect. 34 is intended to include the new subject-matter as part of the ordinary appellate jurisdiction of the High Court. In *Secretary of State for India* v. *Chelikani Rama Rao* (3), the Board had occasion to consider a case which raised very much the same considerations as the present. Under a Madras Forest Act, the Forest Settlement Officer was charged with the duty to examine all claims made to land within a certain area which the Government was proposing to constitute as a reserved forest. The respondent claimed to be the owner of three parcels of land within the notified area, but the Forest Settlement Officer rejected his claims. The Special Act provided that in such a case a claimant might prefer an appeal to the District Court in respect of such rejection only. On appeal being made to the District Court the District Judge affirmed the Forest Settlement Officer's decision. No further appeal had been provided for expressly by the Act, and it was contended that all further proceedings were incompetent. The view taken by the Board, however, was :

> When proceedings of this character reach the District Court that court is

appealed to as one of the ordinary courts of the country with regard to whose procedure, orders and decrees the ordinary rules of the Civil Procedure Code apply.

The *Rangoon* case (2) already mentioned was considered and the decision was held to be explained by the fact that the proceedings were from beginning to end ostensibly and actually arbitration proceedings, the nature of the question to be tried being merely the value to be put upon certain land. Of the case then before the Board it was said :

The claim was the assertion of the legal right to possession of and property in land ; and if the ordinary courts of the country are seised of a dispute of that character it would require in the opinion of the Board a specific limitation to exclude the ordinary incidents of litigation.

Again, in *Maung Ba Thaw* v. *Ma Pin* (4) the Provincial Insolvency Act, 1920, having provided first that the decision of the District Judge should be final, and, secondly, that in a limited class of case there should be a right to appeal to the High Court, the question arose whether, following upon such an appeal to the High Court, a certificate for a further appeal to His Majesty in Council could be given under the Code. The Board, following the case already cited, laid it down that :

when such a right of appeal is given to one of the ordinary courts of the country the procedure, orders and decrees of that court will be governed by the ordinary rules of the Code of Civil Procedure.

In the present case their Lordships are of opinion that the same reasoning applies. The questions which may come for decision before a tribunal under the Sikh Gurdwaras Act include questions which in substance concern the nature of the trusts under which the endowments of certain religious institutions are held. They also include questions of compensation for loss of office and questions as regards claims to property in respect of which the tribunal's powers are not limited by any provisions as to value. There is, moreover, a provision in sect. 32 of the Act whereby, in the course of any suit or proceeding in a civil or revenue court, such court is empowered to frame an issue in respect of claims made in connection with a notified Sikh Gurdwara, and to forward a record of the suit or proceeding to a tribunal for decision, the court being obliged to determine the suit or proceeding in accordance with such decision subject to the right of appeal given to the High Court by sect. 34. Having regard to the character, the variety and the importance of the questions to be dealt with by a tribunal, and to the terms in which the right of appeal to the High Court is provided by the section, their Lordships are of opinion that the provisions of the Civil Procedure Code with reference to appeals to His Majesty apply to decrees of the High Court made under sect. 34 of the Sikh Gurdwaras Act. The preliminary objection is therefore overruled. Their Lordships have not had

occasion to consider and do not pronounce upon the question whether the same conclusion could be reached in the case of appeals brought to the High Court under sects. 106 and 142 of the Act.

Their Lordships then dealt with the appeal.

Solicitors : *Hy. S. L. Polak & Co.* (for the appellant) ; *Nehra & Co.* (for the respondents).

[*Reported by* SAM KHAMBATTA, ESQ., *Barrister-at-Law.*]

RAJA SARDA MAHESH PRASAD SINGH *v.* BADRI LAL SAHU.

PRIVY COUNCIL (Lord Alness, Sir John Wallis and Sir George Rankin), **January 23, 1936.**]

Appeals to Privy Council—Special leave—Right of appeal—Prerogative.

The (Indian) Scheduled Districts Act (XIV of 1874) gives the Court of the Collector power to try and determine suits of every description, and under the Act the court is to be considered as the District and principal court of original jurisdiction, and the Act gives a right of appeal from the court of the Collector to the court of the Commissioner as the highest Court of Appeal. However, the Act provides (r. 9) : "It shall be in the power of the Local Government to refer to the Board of Revenue any case in which the Commissioner, on appeal from the Collector, may have reversed the decision of the lower court, and the orders of the Board in such case shall be final."

On a preliminary objection taken to the competence of the appeal :—

HELD : the effect of r. 9 was to enable the Local Government to constitute *pro hac vice* the Board of Revenue a Court of second appeal with full appellate jurisdiction, but this could not affect His Majesty's prerogative to grant special leave to appeal.

[EDITORIAL NOTE. The jurisdiction of the Judicial Committee of the Privy Council, or of His Majesty in Council, is essentially a matter of prerogative. It cannot therefore be taken away by general words in a colonial statute, not expressly mentioning the prerogative. It is based upon the theory that every subject has a right to place his grievance before the King and that the Crown has a duty to see justice administered to all its subjects.

FOR THE APPELLATE JURISDICTION OF THE PRIVY COUNCIL, see HALSBURY, HAILSHAM Edn., Vol. 11, pp. 221-222, paras. 425-428,and FOR THE CASES, see DIGEST, Vol. 16, pp. 134-135, Nos. 321-338.]

Cases referred to :

(1 *Rangoon Botatoung Co.* v. *Rangoon Collector* (1912), L.R. 39 Ind. App. 197 ; 17 Digest 500, *640.*

(2) *Maung Ba Thaw* v. *Ma Pin* (1934), L.R. 61 Ind. App. 158 ; Digest Supp.

Leslie De Gruyther, K.C. and *W. Wallach*, for the appellant, cited *Maung Ba Thaw* v. *Ma Pin* (2).

Sir Thomas Strangman and *A. G. P. Pullan* for the respondents, cited *Rangoon Botatoung Co.* v. *Rangoon Collector* (1) at p. 200.

The judgment of their Lordships was delivered by Sir John Wallis.

Sir John Wallis: This is an appeal by special leave from a judgment and decree of the court of the Board of Revenue for the United Provinces of Agra and Oudh confirming the appellate judgment and decree of the court of the Commissioner of the Benares Division, which had decreed the plaintiffs' suit reversing the judgment of the court of the Collector of Mirzapur which had dismissed the suit.

The Robertsgang tahsil of the Mirzapur District in which the property is situated is a scheduled district under the Indian Scheduled Districts Act, 1874, and, under the rules for the administration of civil justice made pursuant to that Act, the court of the Collector has power to try and determine suits of every description and is to be considered as the District and principal court of original jurisdiction, and the court of the Commissioner of Benares as the highest Court of Appeal. It is, however, provided by r. 9 as follows:—

> It shall be in the power of the Local Government to refer to the Board of Revenue any case in which the Commissioner, on appeal from the Collector, may have reversed the decision of the lower court, and the orders of the Board in such case shall be final.

In their Lordships' opinion the effect of this rule is to enable the Local Government to constitute *pro hac vice* the Board of Revenue a court of second appeal with full appellate jurisdiction. A preliminary objection has been taken that the appeal is incompetent owing to the provision in the rules that the order of the Board is to be final. As to this, it is sufficient to say that these rules do not affect His Majesty's prerogative to grant special leave to appeal, which has been granted in this case.

Their Lordships then dealt with the appeal.

Solicitors: *T. L. Wilson & Co.* (for the appellant); *W. W. Box & Co.* (for the respondents).

[*Reported by* Sam Khambatta, Esq., *Barrister-at-Law.*]

DRAKE *v.* GRAY.

[COURT OF APPEAL (Slesser, Romer and Greene, L.JJ.), **February 25, 26, 27, 28, 1936.**]

Sale of land—Restrictive covenants—No building scheme—Devolution of benefit of covenants—Subsequent purchaser of part of land retained.

Testator gave his residuary estate upon trust for sale and directed his trustees to divide the proceeds between his three sons, who took absolutely, and his two daughters, whose shares were settled. Certain unsold realty was partitioned between the five children, and in the partition deed all the land was subjected to certain restrictions. There was no building scheme. The covenant imposing the restrictions was in the following form: "The trustees [to whom the daughters' land was conveyed] do hereby for themselves and their assigns to the intent and so that the covenants hereinafter contained shall be binding on the lands and premises hereby assured into whosoever hands the same may come but not so as to render the trustees or any of them personally liable in damages for any breach thereof after he or she shall have parted with all interest in the respective premises hereby assured covenant with the respective parties hereto of the first second and third parts and other the owner or owners for the time being of the remaining hereditaments so agreed to be partitioned as aforesaid and not hereby assured that the trustees their heirs and assigns will at all times hereafter perform and observe" etc. . . . The plaintiff was a subsequent purchaser of a small part of the land conveyed to one of the sons under the partition and the defendant was a subsequent purchaser with notice of the covenant of a small part of the land then conveyed to the trustees on behalf of one of the daughters. Assuming the plaintiff was entitled to enforce against the purchaser the original covenant there was an admitted breach of one of the restrictions:—

HELD: As the covenant was made in favour of "the owner or owners for the time being of the remaining hereditaments so agreed to be partitioned as aforesaid" and it was clearly intended that the three sons among whom the remaining hereditaments were partitioned were severally to have the benefit thereof, that benefit must enure to the owner at any time of any part, however small, of any of the remaining hereditaments. It was immaterial in the particular circumstances of this case that there were no such words as "or any part thereof" following the phrase "the remaining hereditaments."

Per ROMER, L.J.: "Where on a conveyance of land the purchaser enters into a restrictive covenant with the vendor, his heirs and assigns, or other the owners or owner for the time being of certain land, that is sufficient to show that the restrictive covenant is to enure for the benefit of the land so referred to."

[**EDITORIAL NOTE.** While it is not common to find covenants of this kind reserved in a partition deed, the form of the covenant seems to depart little from the standard form in use at the time it was entered into. In recent times it has become usual to add that the covenants are "for the benefit and protection of" certain land—see ENCYCLOPÆDIA OF FORMS AND PRECEDENTS, Suppt. No. 9, p. 715, Cl. 4. The general view based on the judgment in *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; 40 Digest 312, *2664*, has been that in order to make the covenant operative as to a part of the land benefited, the words "or any part thereof" should be added, but this, it is now clear, can be implied from the circumstances. In the present case the covenants at the time of their imposition were for the benefit not of the whole parcel of land referred to, but for the three separate parcels into which

it was partitioned at that same time ; and if the land benefited was then to be so subdivided it was held that there was nothing to prevent the covenant attaching to and benefiting a parcel created upon any further subdivision. The statement of the law given by Romer, L.J., set out at the foot of the headnote has always been accepted as a proper deduction from the decision in *Rogers* v. *Hosegood* (*supra*), but it does not seem to have been so clearly stated in any previous case.

As to the Devolution of the Benefit of Restrictive Covenants, see HALSBURY, 1st Edn., Vol. 25, pp. 456-458, paras. 830-832 ; and for the Cases, see DIGEST, Vol. 40, pp. 311-314, Nos. 2659-2675.]

Cases referred to :

(1) *Re Union of London and Smith's Bank, Ltd.'s Conveyance, Miles* v. *Easter*, [1933] Ch. 611 ; Digest Supp.
(2) *Renals* v. *Cowlishaw* (1879), 11 Ch. D. 866 ; 40 Digest 316, *2686*.
(3) *Spicer* v. *Martin* (1888), 14 App. Cas. 12 ; 40 Digest 308, *2641*.
(4) *Rogers* v. *Hosegood*, [1900] 2 Ch. 388 ; 40 Digest 312, *2664*.
(5) *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305 ; 40 Digest 312, *2665*.
(6) *Kelsey* v. *Dodd* (1881), 52 L.J. Ch. 34 ; 40 Digest 326, *2751*.
(7) *Forster* v. *Elvet Colliery Co.* (1908), 77 L.J. K.B. 521.

Appeal from an order of Luxmoore, J., made on July 10, 1935, declaring that the plaintiff (the respondent) was entitled to enforce against the defendant (the appellant), as owner and occupier of certain land, the restrictive covenants contained in a conveyance dated Jan. 23, 1922 ; and that a house recently erected on the said land of the defendant was so erected in breach of one of the said restrictive covenants ; and granting an injunction restraining the defendant from committing further breaches of any of the said covenants.

Mr. Henry Thomas Tubbs owned freehold land at Littlestone-on-Sea, Romney Marsh, Kent. On Mar. 10, 1915, he made a will giving his residuary estate to trustees on trust for sale, the proceeds to be divided among his three sons and two daughters in equal shares, the daughters' shares being settled. On Dec. 9, 1921, the court authorised a partition between the five of the lands then remaining unsold. On Jan. 23, 1922, four deeds of partition were drawn up by the three sons and the trustees for the daughters. These deeds had attached to them four identical plans in which the land was shown divided into a large number of scattered plots, some coloured pink and others coloured yellow, green, blue and mauve respectively. Only the yellow and the blue-coloured land was concerned in this action. All the land coloured yellow was vested by one of the deeds in Mr. Edwin Tubbs, one of the sons, in fee simple, and the pink and green coloured lands were vested in the two other sons respectively. The lands coloured blue and mauve were vested by another deed in trustees for the benefit of the two daughters. Each partition deed recited that all lands to be partitioned should be subject to certain restriction, which are set out in the judgment of Slesser, L.J.

On Jan. 6, 1933, a small portion of one of the " yellow " plots was conveyed to the plaintiff, Mr. H. G. T. Drake, subject to the same

restrictions as those in the earlier conveyances. The defendant, Mrs. Marjorie Gray, on Jan. 20, 1933, bought a piece of one of the " blue " plots, which fronted for a short distance on the Coast Drive. She had notice of the restrictions. The trustees who were the vendors, purported in her conveyance to vary the restriction in the partition deed by requiring her to undertake that no house or part of a house should be erected upon the land conveyed to her of less cubical contents than ten thousand cubic feet. The plaintiff's consent was not obtained to this variation. The defendant thereupon erected a house of less cubic capacity than fifteen thousand cubic feet.

The plaintiff then brought this action, in which LUXMOORE, J., held that the words " the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned as aforesaid " in the covenant had been deliberately chosen in preference to the phrase used in the recital: " all the lands agreed to be partitioned," and showed a clear intention to annex the covenant to each and every portion of the pink, yellow and green land. He considered that these words could not be intended to provide that the respective parties of the first, second and third parts, and other the owner or owners for the time being, must together own the whole of the pink, yellow and green lands and could only enforce the covenant together. The covenant was not meant to enure for the benefit of the particular pieces of land coloured pink, yellow and green so that the only persons who could enforce the covenant were the owners of the entirety of each piece of that land. The covenant could not be annexed to the whole of the hereditaments as one indivisible entity, because they had already been divided. It followed that there must be a several covenant, and therefore that the covenant must be annexed to the estate in its component parts. The trustees had no power to vary the restriction governing the minimum size of the houses without the consent of every person entitled to the benefit of it, and the plaintiff had not consented and he was entitled to enforce the covenant.

W. C. Cleveland-Stevens, *K.C.*, and *W. G. H. Cook*, for the appellant (the defendant).

G. P. Slade and *W. J. C. Tonge*, for the respondent (the plaintiff).

Cleveland-Stevens, *K.C.*: The restrictive covenant was not imposed for the benefit of this piece of land held by the plaintiff. In *Re Union of London and Smith's Bank Limited's Conveyance* (1) it was held that, apart from building schemes, where a vendor on sale of part of his land takes a restrictive covenant from the purchaser and afterwards sells a part of his retained land, the purchaser of this part is not entitled to the benefit of the covenant unless he can establish that he is an express assignee of the benefit of the covenant, or that the covenant was imposed for the benefit of the particular piece of land he has bought, and was not imposed generally for the benefit of the vendor's retained land as a whole.

The doctrine is not a new one: *Renals* v. *Cowlishaw* (2); *Spicer* v. *Martin* (3). In *Rogers* v. *Hosegood* (4) (at p. 404) "by express declaration on the face of the conveyances . . . the benefit of the two covenants in question was intended for all or any of the vendor's lands near to or adjoining the plot sold." In *Reid* v. *Bickerstaff* (5), Cozens-Hardy, M.R., said at p. 320:

> A subsequent purchaser of part of the estate does not take the benefit of the covenant unless (*a*) he is an express assignee of the covenant, as distinct from assignee of the land, or (*b*) the restrictive covenant is expressed to be for the benefit and protection of the particular parcel purchased by the subsequent purchaser.

In *Kelsey* v. *Dodd* (6), Jessel, M.R., said at p. 39:

> Future owners cannot take the benefit of a restrictive covenant, because they are non-existent at the time when it was made.

This was approved in *Forster* v. *Elvet Colliery Co.* (7).

Building schemes are an exception to the rule. This plaintiff has no right to the benefit of the restrictive covenant, because he is not an owner of "the remaining hereditaments," but only of a part thereof. For more than forty years conveyancers have found it necessary when they wished to pass the benefit of a restrictive covenant to purchasers of a part of the land benefited, to use the words: "the remaining hereditaments *or any part thereof*." It is necessary that the vendor should know whom he may sue for a breach of covenant, and not have to deal with an indefinite number of undefined owners. In the present case, there was a good reason why the vendors should not have put in those words, for if the subsequent purchaser of any small piece could enforce the benefit of the covenant, they could never remodel their estate.

Slade: No particular form of words is necessary to annex the benefit of the covenant to each part of the land. The nature of the land, the restrictions, and the surrounding circumstances indicated clearly that subdivision was contemplated. Farwell, J., in *Rogers* v. *Hosegood* (4), said at p. 396 that the question of whether a given covenant runs with the land (assuming it affects the mode of occupation or the value of the land):

> is in each case a question of intention to be determined by the court on the construction of the particular document, and with due regard to the nature of the covenant and the surrounding circumstances.

On the more liberal construction of this covenant, the original covenantor suffers no further inconvenience and the original covenantee has the benefit of much greater convenience. If the words "remaining hereditaments" are construed as referring to every part of the remaining partitioned lands, there is no difficulty about their construction and they fall into place in the deed. If the trustees had covenanted with the respective parties *or* other the owners or owner, it might have been

contended that they had contemplated that only the original covenantee should enforce the covenant as long as he held the whole land, and that his successor in title to the whole land should enforce it in his place. The use of the word "and" shows, however, that the right to enforce the covenant passes to any owner of part of the land.

Cleveland-Stevens, K.C., in reply: The covenant is made only with the person or persons who are the owner or owners for the time being of the remaining hereditaments. "The remaining hereditaments" must mean the lands coloured pink, yellow and green—i.e., the lands owned by the three sons and not those held in trust for the daughters. The covenant is not made with the persons who happened to be from time to time the owner or owners of any part of any of these properties. The only persons who would be entitled to sue are (1) the owner or joint owners of the whole estate; (2) the owner or joint owners of all the land of one colour; (3) the owner or joint owners of a whole piece of one colour.

SLESSER, L.J.: This is an action by the assign of a covenantee against the assign of a covenantor on a restrictive covenant, claiming a declaration that the terms of that restrictive covenant have been broken, and an injunction restraining the defendant from committing further breaches of the covenant. The covenant in question, to which I shall have to refer in more detail hereafter, is contained in several documents, but the particular one we have here to consider is in the schedule to the indenture of Jan. 23, 1922, between the covenantors and the covenantees in this particular case. Clause 2 provides:

> No house or part of a house shall be erected upon a plot except of good and permanent building material nor as regards the plots fronting the Coast Drive of less cubical contents than 15,000 feet.

It is now conceded, though at one time there was some dispute whether the house of the defendant has been erected upon a plot fronting the Coast Drive, and there is no question but that the cubical contents of that house are less than 15,000 feet.

Now, in order to understand how the covenant in this case should be interpreted it is necessary, to some extent, to go into the history of the matter. The conveyance of Jan. 23, 1922, to the covenantor in this case contained in its recitals a description sufficient, I think, to set out all the material facts, and they are these. The whole of the lands here in question on which this covenant bears were at one time in the property of one person, Mr. H. T. Tubbs. He made a will in 1915, and thereby he appointed certain trustees, and left his property to five of his children, three males and two females, upon trust for sale and conversion, and upon trust for the males that they should acquire certain vested interests, and certain sums should be brought into hotchpot by them respectively,

and that the share of each daughter of his under the trust should not be paid or transferred to her, but should be retained by the trustees, who should pay the income of the same share to her during her life for her separate use. There follow provisions as to the powers of appointment, and the like, which are not material. Now Mr. Tubbs died in 1919, and thereafter an application was made to the court for partition of these parts of the estate, and as a result there was an order of the Chancery Division made on Dec. 9, 1921, giving liberty to the parties of the first five parts—that is the children—" to exercise powers of making the partition conferred by the said Acts on the tenant for life "; and, pursuant to that liberty, the parties did agree that the land should be partitioned, and a scheme of partition was drawn up. For the purpose of the delineation of that partition the respective lands were, on the plan which we have seen, given different colours. The three men received lands marked pink, yellow, and green. The covenantor in this case, which was Mr. Edwin Tubbs, received the land marked yellow. As to the other two parts of the land, those marked blue and mauve, they were for the daughters, and were to be held on trust subject to the provisions of the will.

The defendant here derives her title from the trustees for the daughters. The properties coloured blue and mauve were subsequently re-settled on the three trustees, one of whom, I think, has since died, and there is no question in this case but that the defendant here had notice of the restrictions (to which I will refer) imposed on the trustees of the blue and mauve land, acting for the daughters by the covenant, with Mr. Henry Tubbs, and with the owners of the land other than the blue and the mauve. It is true that the defendant succeeded in having the restrictive covenant on the cubical contents of the house, as between her and her immediate assignors (that is to say, Miss Louisa Tubbs, who was one of the trustees, and Mr. Samuel Bardsley Mayall, a Clerk in Holy Orders), which is set out in paragraph 2 of the third schedule to the conveyance of Jan. 20, 1930, reduced to 10,000 feet. Her covenant reads :

> No house or part of a house shall be erected upon a plot except of good and permanent building material nor as regards the plots fronting the Coast Drive of less cubical contents then 10,000 feet.

The trustees, Louisa Tubbs and Mayall, do not complain—and, indeed, could not complain—that she had in any way evaded the restrictions of that covenant, but there are, as I have said, recited in the covenant the earlier covenants, and whatever arrangements she made with her assignors and trustees would, of course, be of no avail to her against a claim made by the plaintiff if he is entitled to make it.

Now, as I have said, the plaintiff derives his title also from a conveyance dealing with part of the lands of Mr. Henry Tubbs ; not, as the defendant

does, with respect to the blue or the mauve, but with respect to the yellow. With regard to his title to the property which had been partitioned, and given absolutely to Mr. Henry Tubbs under the partition order and agreement to which I have referred, it is a fact which produces the difficulty in this case, that he has not acquired by his conveyance the whole of the yellow land, nor even the whole of one of the parcels of the yellow land into which, by the partition order, the property of Mr. Tubbs was divided, but only a strip or part of one of the parcels of the yellow land. It is said in this case that, in so far as he has not acquired the whole of Mr. Tubbs' interest, that is, all the yellow land; or, alternatively, has not acquired one of the divided parcels of the yellow land; or, in the third view, has not acquired the whole of the yellow, the green, and the blue land (because all three views were put before us for consideration), but has taken only a part of a parcel of the yellow land, he is not entitled to rely upon the benefit of the covenant which undoubtedly Mr. Tubbs, the owner of the yellow land, had from the trustees from whom the defendant derives title. Therefore the matter, in my opinion, would depend upon a close examination of the indenture of Jan. 23, 1922, whereby undoubtedly the trustees, Louisa Tubbs and Mayall, did covenant with Walter Tubbs, Edwin Tubbs, Percy Tubbs, Louisa Tubbs, and Mary White, all together, that Walter Tubbs, Edwin Tubbs, and Percy Tubbs should have the benefit of a covenant by which the trustees agreed to be bound; and, as I have said, that covenant which is contained in the schedule lays down, among other matters, that:

> No house or part of a house shall be erected upon a plot fronting the Coast Drive of less cubical contents than 15,000 feet.

Now, so far as the law on this matter is concerned, I find all that is sufficient for the consideration of the present case in the statement of this court as delivered by ROMER, L.J., in the case of *Re Union of London and Smith's Bank Limited's Conveyance* (1), at the bottom of page 627. That was also a case where the defendants, who were then claiming the benefit of the restriction, were not the original covenantees. ROMER, L.J., says:

> It therefore becomes necessary to ascertain what person other than the original covenantee is entitled to the benefit of a restrictive covenant affecting land. This question was put to himself by HALL, V.-C. in *Renals* v. *Cowlishaw* (2), and the answer was given in a judgment so well known that it is unnecessary to refer to it at length. It is a judgment that has received the approval both of this court and of the House of Lords, and has always been regarded as a correct statement of the law upon the subject. Stated shortly it laid down this: that, apart from what are usually referred to as building scheme cases (and this is not a case of that sort), a purchaser from the original covenantee of land retained by him when he executed the conveyance containing the covenant will be entitled to the benefit of the covenant if

the conveyance shows that the covenant was intended to enure for the benefit of that particular land. It follows that, if what is being acquired by the purchaser was only part of the land shown by the conveyance as being intended to be benefited, it must also be shown that the benefit was intended to enure to each portion of that land. In such cases the benefit of the restrictive covenant will pass to the purchaser without being mentioned. It runs with the land.

Now I agree with Mr. Cleveland-Stevens that, following that decision, it is incumbent here upon the plaintiff to show that, on a proper construction of this conveyance, the benefit was intended to enure to each portion of the land. That is the test which I apply when I come to the consideration of the document.

Passing, therefore, to that indenture, we find this position arising: that after the recitals we come to these operative words, that the trustees do hereby, for themselves and their assigns, and

to the intent and so that the covenants hereinafter contained shall be binding on the lands and premises hereby assured into whosoever hands the same may come, but not so as to render the said Edwin Henry Tubbs personally liable to damages for any breach thereof after he shall have parted with all interest in the premises covenant that the respective parties hereto of the first third fourth fifth and sixth parts and each of them and other the owners or owner for the time being of the remaining lands so agreed to be partitioned as aforesaid and not hereby assured that he the said Edwin Henry Tubbs his heirs and assigns—

that, of course, will cover the case of the defendant here—

will at all time hereafter perform and observe the restrictions and stipulations set out in the said first schedule hereto so far as they concern the lands and premises hereby assured.

Now, the first observation I would make is, that in the first place this is a covenant with the respective parties of the first, second, and third parts; that is, Mr. Walter Burnell Tubbs, Mr. Edwin Henry Tubbs, and Mr. Percy Burnell Tubbs; and these are the gentlemen who have respectively, as is stated in one of the recitals, the land coloured pink yellow, and green. Here principally, as I say, we are concerned with the yellow. Therefore this covenant, on the face of it, is a covenant with these three persons, and cannot be a covenant with the owners or owner for the time being, because, of course, at that time no owners or owner for the time being, other than these three persons, were in existence. So far as the covenant with those respective parties is concerned, it is, of course, a covenant with them severally, each being entitled, in respect of his own interest, to the benefits of that covenant.

The difficulty in this case arises for the following reason: that the language goes on—and here we have to consider the intention of the covenantor and the covenantee, to be derived from the language, whether these covenants should or should not run with the land, or a part—

and other the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned.

The words: "or any part thereof," or the word "any," are missing, and in several of the cases to which we were referred this difficulty did not arise, because there were words apt to cover a part as well as the whole of the hereditament. Now here, of course, there is this further difficulty: that if, on Mr. Cleveland-Stevens' view, this has to be read as meaning "the owners or owner standing in the shoes of the respective parties with respect to the whole of their interests," then on that view three possible constructions may be taken. It may be said, on the one hand—and I think this is really the view that Mr. Cleveland-Stevens favours—that, in so far as the lands have already been partitioned, and in so far as it speaks of the respective parties of the first, second, and third parts, it means that the persons following in succession the respective parties must be the owners of the whole of the possession of that particular party; that is to say, that the restrictive covenant could be enforced by anybody who showed that he owned the whole of the yellow land which was at one time the property of Mr. Edwin Tubb. But there is this to be observed: that of the whole of the yellow land which Mr. Tubbs at one time possessed, through a series of dealings with this land, the amount of land which ultimately came down to Mr. Drake became less and less. When Mr. Tubbs, on Mar. 28, 1929, conveyed land to the Bangor House and Estates, Limited, then of the many yellow parcels which he possessed he conveyed only two. When the Bangor House and Estates, Limited, on Oct. 2, 1929, conveyed land to a Dr. Fergusson, one of these two disappeared, and Dr. Fergusson only got one of the parcels, or pieces, of land referred to in the conveyance. Finally, on Jan. 6, 1933, the plaintiff only got a strip, or part, of a plot, and I really do not quite know now whether the case is really put for the defendant in this way: that the plaintiff would have been in any better position if he had owned the whole of one of these pieces, or whether he would need to own the whole of the yellow, or whether he would need to own the whole of the yellow, green, and pink together.

In my opinion such a problem does not arise, because I think that these words are apt to produce a different result. I read this reference to "the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned" in this way. I think that the words: "the remaining hereditaments so agreed to be partitioned" are descriptive of the whole of the remaining hereditaments other than the mauve and the blue, and are not definitive of the yellow, green, and pink as separate hereditaments. I think that all that is meant by the words: "so agreed to be partitioned" is that, giving to the owners or owner for the time being of the remaining hereditaments the benefits of the covenants, it is necessary to describe those remaining hereditaments; and those

remaining hereditaments are described by referring back, on the construction of those words "so agreed to be partitioned as aforesaid," to the recital, which says that the lands were agreed to be partitioned into the colours, pink, yellow, green, blue, and mauve. Now I exclude the blue and the mauve, because they are not the remaining hereditaments. They have already been dealt with, and described as the lands of the covenantees. Therefore we are left with the green, the pink, and the yellow, and I read the words: "of the remaining hereditaments so agreed to be partitioned" as meaning of the green, the pink, and the yellow, taken together as one area, as one subject of a restrictive covenant.

Then, says Mr. Cleveland-Stevens, you must be the owners or owner of the whole of whatever that may be. If my view is right, that "the remaining hereditaments" meant the green, the blue, and the yellow taken together, and not separately, then the construction which Mr. Cleveland-Stevens puts upon the words is an impossible one, because these lands have already been partitioned, and the owner of the whole cannot mean there the owner of the pink, the blue, and the yellow taken altogether, because they are no longer together—they have been partitioned. I think the natural meaning of the words is that any person who owns any part of the pink, the green, or the yellow, is "the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned." Now, if that view is right, it follows that the plaintiff here is entitled to succeed, because he is, apparently, the owner of a part of the yellow land, and if the yellow, the green, and the pink are to be taken as one, it follows that any owner of any part of the green, the pink, or the yellow may have the benefit of these restrictive covenants. Here it is sufficient to say that I think that, without the use of the words "or any part thereof," the phrase is itself sufficient to give to the owner of a part the benefit of this covenant. Mr. Cleveland-Stevens pressed upon us that it was not right to read this covenant other than very strictly, and that the absence of the words "or any part thereof" ought to lead us to the conclusion that these hereditaments—green, pink, or yellow, as the case may be—must be taken as a whole; but I do not recognise any such compulsion. I recognise, and I accept entirely, what was said by this court in the case of *Re Union of London and Smith's Bank Limited's Conveyance* (1), that it must be shown that the benefit was intended to enure to each portion of the land, and it is true that it has been held that the use of the words "or any part thereof" may be apt for that purpose. I cannot, however, read that case as meaning that those words, and those words only, are the only means by which a conveyance may show that the benefit was intended to enure to each portion. The intention, as gathered from this document and from the other documents mentioned, and from the recital of the whole history of the case, is clear, to my mind, that the benefit was to enure to the owner of any

part of the remaining hereditaments, and as the plaintiff was such an owner I think that the learned Judge was right in the conclusion to which he came, and that this appeal must be dismissed with costs.

ROMER, L.J.: The parties agreed in this case as to the law that is to be applied. It is that, in order that the respondent should succeed in his action, he has to show that the benefit of the restrictive covenants entered into by the trustees of Mr. Tubbs' daughters was intended to enure to each portion of the land of the covenantees. The question we have to decide, therefore, is purely a question of construction of the particular covenant before us. Before dealing with the construction of that covenant, it is right that one should bear in mind the particular circumstances in which the covenant was entered into. The late Mr. Henry Thomas Tubbs was possessed, at the time of his death, of a considerable quantity of land at Littlestone in the County of Kent, and by his will he devised all that land to trustees upon trust for sale, the proceeds of the sale to be divisible equally between his five children, of whom three were sons and two were daughters, the shares of the daughters being settled by the will. After the death his trustees managed to dispose of a considerable quantity of the land of which the testator had died possessed, but towards the end of the year 1921 there remained unsold land of a somewhat unusual shape and position. There was a strip of land running along what is called on the plans the Coast Drive, leading from the front part of Littlestone to the high road running from New Romney to Dymchurch, and another strip of land running from the junction of the drive with the main road back in the direction of New Romney, facing on that road. Those strips of land were only, roughly speaking, 150 feet in depth. That land was not easy, one would imagine, to dispose of *en bloc*, and so the children agreed to a scheme of partition, obtaining for that purpose from the Court of Chancery an order giving them leave to enter into the scheme, the land, in the circumstances of the will of Mr. Tubbs, being settled land within the meaning of the Settled Land Act, 1882, s. 63. The scheme was duly agreed upon, and this long strip of land was divided into 25 separate plots, five of which were coloured pink, five coloured yellow, five coloured green, five blue and five mauve. The eldest son took, I think, the land coloured pink, another son took the plots of land coloured yellow and the third son took the plots of land coloured green, and the daughters respectively took the lands coloured blue and mauve. That having been agreed upon the partition was carried out by a series of conveyances dated Jan. 23, 1922. I should imagine that each of these plots of land was, roughly speaking, 200 yards in length, and as part of the scheme it was agreed that every part of the land, the subject-matter of the scheme of partition, should be subjected to restrictive covenants, covenants restrictive as to the user of the plots of land.

Now, one may reasonably infer, having regard to the situation and shape of these plots of land, that it was the intention of each child to develop the plots allotted to him or her under the partition, not as whole plots but as sites for these not very large buildings with which the south coast is now being so plentifully supplied, and I confess that I approach these deeds of conveyance with the feeling that the parties probably intended—though whether they expressed the intention or not is probably a different matter—that, just as every bit of land, that is to say, every small plot into which these larger plots should be divided, should be subjected to the restrictive covenants, so there should be reciprocity, and the owner for the time being of every one of the small plots into which the bigger ones should be subdivided should have the benefit of those covenants. Curiously enough this case resembles to some extent, therefore, the cases which have been subjected to a building scheme. I hasten to add this is not a building scheme within the meaning of the cases, but, as I say, it does curiously resemble them in that particular. Now, each conveyance, for the purpose of giving effect to the partition, was, as I have said, dated Jan. 23, 1922, and the particular one with which we are concerned is the conveyance by which there were conveyed to the trustees for the daughters—because the daughters' shares were sold—the lands coloured mauve and blue. The parties to the deed were, of course, all the children, the trustees, and another gentleman. The deed recites the facts that I have already referred to and recites that, as part of the scheme of partition, it was agreed that all the lands agreed to be partitioned should be subject to the restrictions and stipulations set out in the first schedule. By the operative part of the conveyance all the children, as tenants for life under the settlement which was deemed to exist under the Settled Land Act, conveyed to Mr. Herbert Walter Johnson all the plots or parcels of land shown on the plan annexed to the conveyance, and thereon coloured blue and mauve respectively, to hold to the use of the trustees upon trust for the daughters. Then follows the covenant with which we have to deal.

Now I wish, first of all, to say this: that where on a conveyance of land the purchaser enters into a restrictive covenant with the vendor, his heirs and assigns, or other the owners or owner for the time being of certain land, that is sufficient to show that the restrictive covenant is to enure for the benefit of the land so referred to. The covenant is in these terms: "The trustees"—that is the persons to whom the blue and mauve had been conveyed—"covenant with the respective parties hereto of the first, second and third parts"—those were the three sons—"and other the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned as aforesaid and not hereby assured" that the trustees would observe the covenants contained in the schedule. If I knew no more of the case than is put before my eyes by that particular

covenant, I confess that I should have thought that it was a covenant with the three sons jointly and other the owners or owner for the time being of the rest of the land which had been subjected to the scheme or partition, after there had been deducted the lands coloured blue and mauve. But it is plain that that cannot be the meaning and effect of the covenant, because the words " and other the owners " suggest clearly that the three sons are the owners of the lands coloured yellow, green and pink. They are not in fact, and we know they are not from the previous recitals in the conveyance. One son was the owner of the land coloured yellow, another son in equity—it may be in law by this time, because I do not know in what order the conveyances were executed—was the owner of the land coloured pink, and another son of the land coloured green, and it therefore seems to me that one is compelled to regard this not as a several covenant with the three, but as a several covenant with the three sons and other the owners or owner, not of all the lands subject to the scheme of partition other than the blue and mauve, but of the several parts of the land the subject-matter of the partition, other than the parts coloured blue and mauve. Directly you are forced to insert such words as that for the purpose of construing the covenant, then you have sufficient indication of intention—I should have thought—that the benefit of the restrictive covenants was to follow every bit of the land retained by the sons respectively.

But it may be—the covenant is certainly capable of this alternative construction—that this is a covenant with one son and other the owners or owner for the time being of the lands belonging to that son ; another covenant with the second son and the owners or owner for the time being of the lands belonging to him, and so on. If, therefore, that construction were adopted and the language were construed as showing a covenant with the one son and other the owners or owner for the time being of the land coloured yellow, and so forth, then it might well be that the plaintiff had failed to show that there was an intention that the benefit of the restrictive covenants should enure to every party, say, of the land coloured yellow. I do not myself think that that is the true construction of the deed, but even assuming it was—that is to say, that the covenant can be split up as being a covenant with one son and other the owners or owner for the time being of the land belonging to that son—nevertheless there is no description of the land belonging to that son as, say, being the land coloured yellow. If the covenant with one son had been a covenant with him and other the owners or owner for the time being of the land coloured yellow, I think the appellant would be right in her contention, but I myself draw a distinction between a case where a covenant is made with a vendor and the owners or owner for the time being of the land retained by him, and the covenant with a vendor and other the owners or owner for the time being of the lands retained by him. In the one

case, in order that an assignee should subsequently enforce the covenant, it would be necessary for him to show that he was the assignee of the land retained by the vendor, but where the benefit of the covenant is with the vendor and other the owners or owner for the time being of the lands retained by the vendor, then if an assignee can show that he is an assignee of land retained by the vendor, he is entitled to enforce the benefit of the covenant. Most of the cases that have come before the courts are cases where a covenant has been entered into by a vendor for the benefit of, say, the A.B. estate for the time being. There, of course, there is no intention shown that the benefit should enure for any particular part of the estate, but where, as here, you find, not "the land coloured yellow," or "the estate," or "the field named so and so," or anything of that kind, but "the lands retained by the vendor," it appears to me that there is a sufficient indication that the benefit of the covenant enures to every one of the lands retained by the vendor, and that if a plaintiff in a subsequent action to enforce a covenant can say, "I am the owner of a piece of land or a hereditament, and that belonged to the vendor at the time of the conveyance," he is entitled to enforce the covenant. For these reasons it appears to me that Luxmoore, J., arrived at a right conclusion, and that this appeal fails.

Greene, L.J.: I agree. The question in this case is a pure question of the construction of a particular document considered in relation to very special surrounding circumstances. The question is whether, on the true construction of that conveyance, the benefit of a restrictive covenant is annexed to the whole of the land in question, or only to the land as a whole. The particular words which in this document point out the land for the benefit of which the covenant is taken are the words:

> and other the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned as aforesaid and not hereby assured.

Now, it is to be observed that the whole frame of the covenant aims at a compression of language beyond the competence, apparently, of the draftsman. He has endeavoured to use very closely compressed language to express a rather elaborate conception; but I cannot accept the view that, because the language used is difficult to construe, therefore the court is in some way to construe it in a way favourable to the covenantor. The function of the court is to say what it considers to be the true meaning of the language used, however difficult and however obscure that language may be.

Now, the words to which I have referred which point out the land in respect of which, and for the benefit of which, the covenant is taken, are what may be described as residual words. I myself am unable to construe them as meaning either the particular coloured acreage going to a particular son in reference to the covenant with that son, or as referring

to individual plots of a particular colour, or the sum of individual plots. It appears to me that the draftsman has used language apt to cover all the hereditaments which were not assured by the deed in question: that is to say, the aggregate of the land subject to the partition agreement, less the particular blue and mauve lands which were being dealt with by this particular document. Now, there are two familiar methods of indicating in a covenant of this kind the land in respect of which the benefit is to enure. One is to describe the character in which the covenantee receives the covenant. That is the form which is adopted here, the covenant with so and so, "owners or owner for the time being of" whatever the land may be. Another method is to state by means of an appropriate declaration that the covenant is taken "for the benefit of" whatever the lands may be. Now, in the present case, if I am right in construing this clause as a residuary description of all the lands subject to the partition agreement, other than those comprised in this particular document, the meaning of the words used may, I think, be paraphrased as follows—and when I say that it is a paraphrase, I mean no more than that this is what, in my opinion, the words properly mean: "This covenant is taken for the benefit of all the hereditaments comprised in the partition agreement other than those hereby assured, and may be enforced by the owners or owner of those hereditaments for the time being." That appears to me to be the true meaning of the language used.

Now it seems to me quite impossible, if that be the true view, to construe the reference to the remaining hereditaments as indicating an intention on the part of the covenantors and the covenantees that the only persons entitled to enforce the covenant should be those who at any given moment owned the entirety of those remaining hereditaments. The effect of that construction would be that the only persons who could enforce the covenant here given by the trustees would have been the three sons as owners of, and so long as they owned together, the whole of the rest of the estate. It appears to me, in examining this particular language used in relation to this particular and very special transaction, that it would be quite impossible so to construe the words "the remaining hereditaments." Some construction must be put upon them in the context which will at the very least give to each son the right to enforce the covenant as owner of what he receives under the partition. Now, if the words "the remaining hereditaments" include such portions of that residue of remaining hereditaments as arise on one severance—viz., the severance effected by the partition among the three sons—it appears to be quite impossible to say that the words do not include all portions of such residue which will arise on any severance. In other words, if a son is entitled to say that within the true meaning of this covenant he falls within the definition, or that the land which he takes

on partition is land to which the benefit of the covenant was annexed, it must follow necessarily that any holder of any portion of the land indicated is also entitled to say that the covenant enures to his benefit. In other words, returning to the question as I formulated it at the beginning of this judgment, the area of the land pointed out as being the land to which the benefit of the covenant is to be annexed is not on true construction to be taken as that land as a whole ; because if it were so construed it would mean, as I have already pointed out, that the only persons who the moment after this partition was carried through could have enforced the covenant would have been the three sons together. What I think the covenant means is not that it is to be annexed to the land (i.e., all "not hereby assured") as a whole, but that it is to be annexed to the whole of the land ; and the effect of that interpretation is that not only can each son, in respect of what he gets out of the partition and every part of what he gets out of the partition, enforce the covenant, but every owner for the time being of any part of the hereditaments so comprehensively described is entitled so to enforce it. I am quite unable to accept the view that where the intention is to annex the benefit of a covenant to land in such a way that it can be enforced by the owner of any part of the land, it is necessary to have some form of words such as "the land and every part of it," or something of that kind. It may very well be that in some contexts, and in the use of certain phrases, the only way in which the desired result can be obtained is by introducing such words as "and any part thereof." In this particular document—executed, as I say, in very special circumstances for the purpose of carrying out a very special scheme, and using, indeed, very special language—I find myself able without hesitation to come to the conclusion that the intention is sufficiently clearly expressed to produce the result which I have indicated. I agree that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Leave to appeal to the House of Lords refused.

Solicitors : *A. C. Dowding* (for the appellant) ; *Braikenridge & Edwards*, agents for *Urmston, Case & Roper*, Maidstone (for the respondent).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

JOHN LANE, THE BODLEY HEAD LTD. *v.* ASSOCIATED NEWSPAPERS LTD.

[KING'S BENCH DIVISION (DU PARCQ, J.), **January 30, 31, February 14, 1936.**]

Copyright—Infringement—Innocence as a statutory defence—Copyright Act, 1911, (*c.* 46), *s.* 8.

In an action for damages (i) for infringement of the copyright in a certain publication, and (ii) for conversion, the defendants admitted the infringement, but contended that, as they were not aware and had no reasonable ground for suspecting that copyright subsisted in any work of which the copyright had been infringed by the printing and publishing the story complained of, they were protected by the Copyright Act, 1911, s. 8. The Judge found that the defendants did not know of the existence of the original work and had no reasonable ground for suspecting that their publication would constitute an infringement of copyright :—

HELD : (i) the Copyright Act, 1911, s. 8, afforded no defence as the defendants had not proved that they did not know that the original work was the subject of copyright.

(ii) the defendants were liable under sects. 6 and 7 for damages both for the infringement and for the conversion.

[**EDITORIAL NOTE.** The Copyright Act, 1911, s. 8 raises a peculiar defence to an action for an infringement. The innocence that is required as a defence is an innocence of the fact that copyright subsists in the work infringed. Ignorance of the existence of the work is not in point. The point is that knowing of the existence of the work the alleged infringer must believe as a fact and not as a consequence of law that his work is not an infringement. So far this only seems to have been done with success on one occasion. That was in *Swinstead* v. *Underwood (R.) & Sons* (1924), MacG. Cop. Cas. (1923-28) 39, where the defendant copied an inscription on a tombstone.

FOR THE LAW UNDER SECT. 8, see HALSBURY, Hailsham Edn., Vol. 7, p. 587, para. 911 ; and FOR THE CASES, see DIGEST, Vol. 13, p. 166, No. 41 ; and FOR COPYRIGHT ACT, 1911, s. 8, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 3, p. 730.]

Cases referred to : —

(1) *Byrne* v. *Statist Co.*, [1914] 1 K.B. 622 ; 13 Digest 166, *41*.

(2) *Sutherland Publishing Co., Ltd.* v. *Caxton Publishing Co., Ltd.*, [1936] 1 All E.R. 177.

(3) *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.*, [1892] A.C. 166 ; 17 Digest 102, *165*.

(4) *Braby* v. *Donaldson*, [1926] App. D. 337 (South Africa) ; Digest Supp.

ACTION for damages (i) for infringement of copyright and (ii) for conversion. The facts and pleadings are fully set out in the judgment.

H. C. Leon and *C. H. C. Haslam* for the plaintiffs.

Walter T. Monckton, K.C., and *Valentine Holmes* for the defendants.

DU PARCQ, J. : The plaintiffs in this action are John Lane, The Bodley Head Limited, a well-known firm of publishers, and Mr. Charles Arthur Munro, executor of the late Mr. Hector Munro, who during his

lifetime wrote many works of undoubted literary merit under the name of "Saki." The defendants, the Associated Newspapers Limited, are the proprietors of the "Evening News," a newspaper with a very large circulation.

Some time before his death in action in 1916 Mr. Hector Munro wrote a short story called "The Interlopers." It was first published in a weekly paper, and after his death was included in the year 1919 in a volume of short stories entitled "The Toys of Peace," and in the year 1930 in another volume containing the "Complete Short Stories" of "Saki." On May 30, 1935, one Hector Allan-Smith submitted to the editor of the "Evening News" a short story entitled "The Gods Decide." The editor believed that it was a piece of original work by Allan-Smith and it was accepted and paid for, and on July 15, 1935, appeared, appropriately illustrated, in that day's issue of the "Evening News." Mr. Monckton, on behalf of the defendant company, admitted that by publishing "The Gods Decide" they infringed the copyright in "The Interlopers," and further admitted that the plaintiff, Mr. Charles Arthur Munro, is the owner of that copyright. It seems to be clear that the plaintiff company are not owners of the copyright. It was agreed that any discussion as to the propriety of joining the company as plaintiffs should be deferred until the question of costs came to be considered. I should add that Allan-Smith was joined as a defendant, but was not before the court as the writ was never served upon him. In his absence, I shall say as little about him as possible.

The plaintiffs do not ask for an injunction, but, first, for damages for infringement of copyright under Copyright Act, 1911, s. 6, and secondly, for damages for conversion on the footing that the infringing copies published were the property of the owner of the copyright under sect. 7 of the same Act.

The defendants sought to rely upon sect. 8 of the Act as a complete answerto the claims for damages under sects. 6 and 7. The first question which I have to decide is whether in the circumstances of this case sect. 8 provides a defence against the whole, or any part, of the plaintiffs' claim. The section is in these words:

> Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work.

In the present case the learned pleader who settled the defence did not adhere closely to the words of the section, but pleaded in these terms:

> The defendants were not aware and had no reasonable ground for suspecting that copyright subsisted in any work of which the copyright was infringed by the printing and publication of the story entitled "The Gods Decide."

The defendants contended that sect. 8 must be read as meaning that where proceedings are taken in respect of the infringement of the copyright in an original work which has been imitated, and the defendant proves that he was not aware and had no reasonable ground for suspecting that copyright subsisted in that original work, the defendant brings himself within the exemption. Then, say the defendants, how better can we prove that we had no ground for suspecting that copyright subsisted in the original work than by proving that we did not know of the existence of the original work? The evidence has satisfied me that those persons who must be taken to represent the defendant company in this department of its activities, that is, the literary editor of the "Evening News" and his assistants, did not know of the existence of "The Interlopers," and did not know or suspect that "The Gods Decide" was not an original work. I am satisfied also that they had no reasonable ground for suspecting that the publication of "The Gods Decide" would constitute an infringement of copyright. The literary editor was not unacquainted with the works of "Saki." He had read many of them, and published some. He did not happen to have read or heard of "The Interlopers," and those who assisted him seem also to have been in the same state of ignorance, which reflects no sort of discredit upon them. It was suggested that the editor should always demand from a contributor a written assurance that the contributor was the owner of the copyright of the work which he submitted. But in my view a contributor who submits a story to the editor as suitable for publication is thereby representing that he has the right to authorise its publication, and the repetition of an assertion does not make it any the more likely to be true. It was argued at one time that an indication in the contributor's letter that he was in need of ready money ought to have aroused the suspicions of the editor, but I cannot think that the avowed poverty of an author is any ground even for suspecting that he has copied and is seeking to sell as his own the work of another. If, on the other hand, the suggestion be that the author's infringement of copyright may have been accidental or innocent, his poverty is wholly irrelevant.

Notwithstanding these findings of fact which, so far as they go, are favourable to the defendants, I am of opinion that sect. 8 affords them no defence. The argument of the learned counsel for the defendants derived some plausibility from the accidental circumstance that in this case the story whereby copyright was infringed was a colourable imitation and not a literally exact copy of the work of "Saki." But in my view the position of the defendants is no better than it would have been if the manuscript submitted to them had been a literal transcript of "The Interlopers." It would then, as it seems to me, have been difficult for the defendants to strain the words of sect. 8 to fit this case. In

my view the defendants, in order to take advantage of sect. 8, would have had to prove that they did not know that the work, which originally existed as "The Interlopers," and was presented to them in the guise of "The Gods Decide," was the subject of copyright. It is because "The Gods Decide" is in part the work of "Saki" that the publication of it constitutes an infringement of copyright. In my judgment the defence under sect. 8 was really disposed of when, in cross-examination, the literary editor said: "I assumed that there was copyright in Allan-Smith's story—presumably the copyright was in him." Upon the view which I take of the facts and of the true interpretation of the section, what was said by Bailhache, J., in *Byrne* v. *Statist Co.* (1), at page 628, applies equally here:

> This merely amounts to saying that they supposed themselves to have the authority of the owner of the copyright, a very different thing from alleging and proving that they did not suspect that any copyright existed.

It only remains for me to consider to what damages the owner of the copyright is entitled. Since the decision of the Court of Appeal in *Sutherland Publishing Co., Ltd.*, v. *Caxton Publishing Co., Ltd.* (2), the doubt as to the right of a plaintiff to recover damages under sect. 7 as well as sect. 6 has been resolved in the plaintiffs' favour. Taking the view I do as to the defendants' plea based on sect. 8, I find it unnecessary to decide the question whether in any event sect. 8 could protect the defendants against the consequences of proceedings in conversion under sect. 7. It appears from the transcript of the shorthand note of the judgments in the case which I have just cited (a copy of which has been supplied to me) that the Court of Appeal left this point open, and in the circumstances I think that nothing would be gained by any expression of opinion from me upon this vexed subject. Mr. Leon, for the plaintiffs, rightly claims to be entitled under sect. 7 of the Act to the value of all infringing copies of the work at the date of the hypothetical conversion. At its highest his claim under this head is put at the sum of £2,112, the amount of the gross proceeds of sale of the issue of the "Evening News" containing "The Gods Decide," but I gather that neither Mr. Leon nor his clients will be much disappointed if a smaller sum than that is recovered. Putting his claim at the lowest, and it may be at some sacrifice of principle, Mr. Leon conceded that on one view no more than £108 might be awarded under this head. The latter sum represents the fraction of £2,112 which is proportionate to the fraction of space occupied in "The Evening News" by the short story in question, or rather by the short story together with its inseparable companion, the columns of news or literary matter printed on the other side of the sheet. Mr. Monckton, on the other hand, founding himself upon a passage in Mayne on Damages, 10th Edn., page 378 and the following

pages, and upon some instructive *dicta* of LORD MACNAGHTEN in *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.* (3), at pages 173 to 177, invited me to take the view that hardly more than nominal damages should be awarded. It is plain as a matter of history that, although in strictness it does not seem to be right that the tortfeasor should take credit for expenses to which he has been put in and about converting another person's property, not only juries, with the connivance or encouragement of judges, in courts of law, but even judges sitting alone in courts of equity, have found means to temper the wind to the shorn lamb. On the other hand, the tendency in copyright cases in this country seems to have been to take no account of such expenditure, and it is interesting to see that the Appellate Division of the Supreme Court of South Africa, when administering an Act identical with our own held that a person whose copyright in a book had been infringed was entitled to demand delivery of all the copies of the offending work in the possession of the person who had infringed the copyright and payment of the full price received by such person for all copies of the work which had been sold (*Braby* v. *Donaldson* (4)).

I think that I ought not to regard the expenses of producing the newspaper as a relevant fact. It is not, however, my view that I can arrive by any exact arithmetical process at the sum which it is proper to award. Let it be granted that the plaintiffs are entitled to the full price received for the sheets containing the story, "The Gods Decide"; it still does not follow that the fraction of each 1*d.* paid for the paper which is proportionate to the space occupied by "The Gods Decide," must be taken to have been paid for that story. I cannot but think that the paper was bought by many who had no intention of reading the story and by some who did not know that the paper contained a story. Others again may have paid the whole of their penny for the pleasure of reading "The Gods Decide." Taking everything into consideration, and making the best estimate (if that word be not too flattering) of which I feel myself to be capable upon the evidence, I assess the damages for conversion at £50.

In the recent case in the Court of Appeal the learned Lords Justices pointed out that judges in assessing damages must be careful not to compensate a plaintiff twice over for the same loss. I see no reason in the present case to award any large sum by way of damages under sect. 6. The value of the infringing copies represents a much larger sum that the owner of the copyright would have received from the newspaper proprietors for the right to print "The Interlopers" in one issue of their paper. I do not think that he has much cause for complaint left. I doubt if the value of the copyright is much affected by the publication on one day of a colourable imitation in an ephemeral form. Under sect. 6 I award the sum of £5.

There will therefore be judgment for the plaintiff, Mr. Munro, for the total sum of £55.

Solicitors : *Rubinstein, Nash & Co.* (for the plaintiffs) ; *Lewis & Lewis* (for the defendants).

[*Reported by* C. L. Whishaw, Esq., *Barrister-at-Law.*]

REX *v.* HENRY WILLIAM WICKS.

[Court of Criminal Appeal (Talbot, Macnaghten and du Parcq, JJ.), **February 10, 11, 17, 1936.**]

Criminal law—Criminal libel—Onus of proof—Likelihood of breach of peace —Privilege—Libel Act, 1843 (*c.* 96), *ss.* 4, 5.

W. had been concerned in litigation with an insurance company. In a letter to C., whom the company had charged with an offence W. published a defamatory libel concerning G., the solicitor acting for the company. For this he was charged and convicted :—

Held : (i) the libel was not one which the jury would have been justified in regarding as trivial.

(ii) the prosecution are not bound to prove that the libel would have been unusually likely to provoke a breach of the peace.

(iii) the slender link of common interest between W. and C. could not authorise the publication of false and defamatory statements about a third person whose character was irrelevant to any question which was the legitimate concern of C., and the occasion was not privileged.

(iv) the jury were entitled in the absence of evidence to the contrary to draw the inference that as W. had an intimate knowledge of G. he knew the libel to be false.

(v) in the absence of a plea of justification, the statements must be assumed to be false.

[**EDITORIAL NOTE.** The basis of a criminal prosecution for libel is that the publication thereof tends to promote a breach of the peace. In the case of spoken words, *i.e.*, slander, a prosecution still only lies when the words tend immediately to a breach of the peace, but in the case of written words, *i.e.*, libel, the law, though it still in theory requires a tendency to promote a breach of the peace, allows an indictment in respect of words that are clearly defamatory. Prosecutions are not encouraged where the civil remedy is a sufficient satisfaction to the party whose reputation has been injured ; but where civil proceedings are likely to be abortive, and the defendant has shown a wanton disregard of the legal consequences of his words, criminal proceedings are not looked upon with disfavour by the courts. For these reasons prosecutions for libel are comparatively rare.

As to Criminal Proceedings for Libel, see HALSBURY, Hailsham Edn., Vol. 20, pp. 546, 547, paras. 686-688 ; and for the Cases, see DIGEST, Vol. 32, pp. 188-202, Nos. 2301-2524.]

Cases referred to :

(1) *R.* v. *Labouchere* (1884), 12 Q.B.D. 320 ; 32 Digest 192, *2366.*

(2) *R.* v. *Holbrook* (1878), 4 Q.B.D. 42 ; 32 Digest 83, *1135.*

(3) *Thorley* v. *Kerry* (*Lord*) (1812), 4 Taunt. 355 ; 32 Digest 29, *202.*

(4) *R.* v. *Walter* (1799), 3 Esp. 21, N. P. ; 32 Digest 82, *1133.*

(5) *Watson* v. *M'Ewan, Watson* v. *Jones*, [1905] A.C. 480 ; 32 Digest 109, *1407.*
(6) *Wood* v. *Cox* (1888), 4 T.L.R. 652 ; 32 Digest 188, *2307.*
(7) *R.* v. *London* (*Lord Mayor*) (1886), 16 Q.B.D. 772 ; 32 Digest 11, *29.*
(8) *R.* v. *Munslow*, [1895] 1 Q.B. 758 ; 32 Digest 198, *2464.*
(9) *Boaler* v. *R.* (1888), 21 Q.B.D. 284 ; 32 Digest 198, *2473.*

APPEAL from a conviction by the Recorder of London on Jan. 10, 1936, for publishing a defamatory libel concerning Francis James Ward Gurney, knowing it to be false.

W. A. L. Raeburn and *Glanville Brown* for the appellant.

Sir Patrick Hastings, K.C., and *G. B. McClure*, for the respondents.

Raeburn : Under the Libel Act, 1843, s. 4 knowledge of the untruth of the libel is an element of the offence and under sect. 5, it is not. The jury were directed to find a verdict upon both counts and upon that direction, they convicted upon both counts, notwithstanding a submission that the two counts must be alternative as being both founded upon the same facts. Further, the libel was not indictable because it was not calculated to cause a breach of the peace and was privileged.

[He referred to *R.* v. *Labouchere* (1), *Wood* v. *Cox* (6), *R.* v. *London* (*Lord Mayor*) (7)].

Sir Patrick Hastings, K.C. : It has been accepted for 100 years as law that every defamatory libel may at the will of the person defamed be made the subject of either civil or criminal proceedings, and the reason why it may be the subject of criminal proceedings is because, if the libel is defamatory, it tends to create a breach of the peace. Reference to modern authorities shows no case where it is suggested that if a libel is defamatory, criminal proceedings will not lie, subject to the jury finding on proper advice from the judge, that the matter is so trivial that it ought not to be a matter of criminal proceedings. [He referred to *R.* v. *Holbrook* (2), *R.* v. *London* (*Lord Mayor*) (7), *R.* v. *Munslow* (8), *Boaler* v. *R.* (9)].

TALBOT, J. : DU PARCQ, J., has been good enough to prepare the judgment in this case and we have seen it and considered it, and he will now deliver it as the judgment of the court.

DU PARCQ, J. : The appellant was convicted before the Recorder of London at the Central Criminal Court on Jan. 10, 1936, upon an indictment which charged him with publishing a defamatory libel concerning Francis James Ward Gurney knowing it to be false. A second count charged him with publishing the libel, with no averment that the appellant knew the libel to be false. The offences charged are those for which punishment is prescribed by sects. 4 and 5 respectively of the Libel Act of 1843. The jury convicted the appellant on both counts, and he was sentenced by the learned Recorder to 12 months imprisonment.

The libel was contained in a letter addressed by the appellant to a

man named Chapman, who at the date when it was written had been arrested and charged with forgery and other criminal offences at the instance of the Sun Life of Canada, an insurance company. Mr. Gurney is a solicitor who acts for that company, and he gave evidence to the effect that, in the course of his duties, he had come into contact with the appellant during the last few years by reason of the fact that there had been litigation between the appellant and the company and some of its servants. That litigation, he said, terminated unsuccessfully for the appellant in every case. Nobody has suggested that the letter written to Chapman was not defamatory of Mr. Gurney. In it the appellant claimed to have "a fairly intimate knowledge" of that gentleman, whom he described as "this man Gurney," and said that according to his (the appellant's) experience, he was a man of "depraved moral character"—"even more so" than another man whom the appellant described as Mr. Gurney's "criminal associate." The appellant made more definite allegations against Mr. Gurney, which it is unnecessary to repeat. There was no plea of justification. These allegations must therefore be taken to be false, as no doubt they are. The learned Recorder rejected a submission made on behalf of the appellant that there was no case to go to the jury because there was no evidence that the libel was likely to result in a breach of the peace, and directed the jury in these words:

> A defamatory libel consists in the writing and publishing of defamatory words of any living person, words calculated or intended to provoke him to wrath and expose him to public hatred, contempt, or public ridicule, or damage his reputation . . . words written of a man which are likely to provoke him to commit a breach of the peace, or, if seen by others, to hold him up to hatred, ridicule or contempt, or to damage his reputation.

In our judgment, the view taken by the learned Recorder on this point was right. It is true that a criminal prosecution for libel ought not to be instituted and, if instituted, will probably be regarded with disfavour by judge and jury, when the libel complained of is of so trivial a character as to be unlikely either to disturb the peace of the community or seriously to affect the reputation of the person defamed. We were referred to well-known passages in Hawkins' Pleas of the Crown and in the judgment in *R.* v. *Labouchere* (1), which emphasise this truth, and it may well be that cases will sometimes occur in which juries may properly refuse to convict a man accused of criminal libel where the offence is trivial. It is also true that, as Lush, J., said in *R.* v. *Holbrook* (2), libel is ranked among criminal offences "because of its supposed tendency to arouse angry passion, provoke revenge, and thus endanger the public peace. There is, however, in our judgment, no ground for the suggestion made at the Bar that it is incumbent upon the prosecution to prove that the libel in question would have been unusually

likely to provoke the wrath of the person defamed, or that the person defamed was unusually likely to resent an imputation upon his character. We find no support for this theory in any judgment. On the contrary, the law remains what it was stated to be in the year 1812 by MANSFIELD, C.J., in *Thorley* v. *Lord Kerry* (3), at p. 364, when he said :

> There is no doubt that this was a libel, for which the plaintiff in error might have been indicted and punished ; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule ; for all words of that description an indictment lies.

It is of interest to observe that the question in that case was whether an action for damages could be brought in respect of words for which it was not doubted that an indictment would lie. Indeed, it was recognised at the beginning of the eighteenth century that libel was an exception to the general rule that *mens rea* was necessary to constitute a criminal offence (*R.* v. *Walter* (4)). It cannot be suggested that the libel in the present case was one which any jury would have been justified in regarding as trivial, and there is, in our judgment, no substance in the first ground of appeal.

It was further contended that the letter was published on an occasion which was either absolutely privileged or the subject of qualified privilege. The learned Recorder ruled that the occasion was not privileged absolutely or at all, and we agree with him. The defamatory letter was written to a man in whose affairs the appellant had no interest, except that they had both come into conflict with the Sun Life Assurance Company of Canada. This slender link of common interest could not, in any sense, authorise the publication of false and defamatory statements about a third person, whose character was irrelevant to any question which was the legitimate concern of Chapman The submission that absolute privilege attached to the letter because it is to be regarded as the equivalent of a witness's proof, or of a confidential communication to a solicitor in relation to legal proceedings (see *Watson* v. *M'Ewan* (5)), seems to us to have no relation to the facts.

Finally, it was argued that the conviction upon the first count of the indictment could not stand because there was no evidence before the jury that the appellant knew the libel to be false. There is no doubt that, under such a count, it is for the prosecution to satisfy the jury that the defendant had such knowledge, and that the burden of proving that he had not such knowledge never lies upon the defendant. In the present case, we see no reason for holding that the prosecution did not fully discharge the burden that rested upon them. The falsity of the libel is to be presumed, and, in the absence of a plea of justification, could not be questioned. The best and often the only way of proving that a statement was known to be false by the person who made it is to prove that

he had the means of such knowledge. A jury is then entitled to draw what may be, in some circumstances, the irresistible inference that he had knowledge in fact. In the present case, the jury may well have thought, in the absence of any evidence to the contrary (and the appellant gave none), that a man who had had a fairly intimate knowledge of Mr. Gurney for some years would know very well whether statements about Mr. Gurney's character were true or not, and they had the appellants own word for it that he had such an acquaintance with Mr. Gurney. In his summing-up to the jury the learned Recorder used these words :

> Did the defendant know those words to be false ? Members of the jury, he had not attempted to prove them. It stands out before you quite clearly. In these circumstances, have you any difficulty in your minds about arriving at the conclusion that he knew them to be false ?

The letter had, of course, been read and commented upon to the jury, and in those words the learned Recorder was putting to them, in a shorter form, the same considerations which we have set out at length. We see no reason to regard this as a misdirection.

It is only necessary to add that, having in mind the nature of the libel and all the circumstances of the case, we see no reason to question the propriety of the sentence.

The appeal is dismissed, and the conviction and sentence must stand.

Solicitors : *Gower, Pollard, Thorowgood & Tabor* (for the appellant) ; *Freshfields, Leese & Munns* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

TYNEDALE STEAM SHIPPING CO., LTD., *v.* ANGLO-SOVIET SHIPPING CO., LTD.

[COURT OF APPEAL (Lord Roche, Scott, L.J., and Eve, J.), **March 2, 1936.**]

Shipping—"Baltime" Charter—Damage hindering discharge—Cesser of hire clause—Additional costs of discharge.

The "Baltime" Charter of 1920 includes the following clauses: ". . . the owners to maintain the steamer in a thoroughly efficient state in hull and machinery during service; . . . the steamer to be fitted and maintained with winches and derricks; . . . in the event of loss of time . . . caused by . . . accident preventing the working of the steamer and lasting more than 24 consecutive hours, hire to cease from commencement of such loss of time until steamer is again in efficient state to resume service." The steamer was damaged and lost her foremast to which the forward winches were attached. Discharge was delayed some six days and shore cranes and floating craft were hired by the charterers to give assistance:—

HELD: (i) in the absence of an express or implied request by the owners for assistance they were not liable to repay to the charterers the sums paid for the hire of the shore cranes and floating craft.

(ii) on a proper construction of the charterparty the cesser of hire clause had been put into operation by the delay, and the shipowners' right to be paid hire ceased in respect of the time occupied in discharge.

(iii) in construing a standard charterparty of this nature it must be assumed that it was drawn and its terms settled with full knowledge of the cases reported prior to the time the document was settled, and was intended to be construed and ought to be construed in the light of those cases.

[**EDITORIAL NOTE.** The Court of Appeal in this case lay down a very useful principle of construction in these days of model deeds and standardised forms. Where it is clear that these have been settled by lawyers and others well-acquainted with the law on the subject, then they are to be construed upon the footing that the decided cases on the matter in question were present to the mind of the draftsmen and the form was intended to be construed upon that footing. Clauses therefore that, on the face of the document, were drafted to meet the position created by a particular authority, must be construed to take advantage of or to avoid the difficulty created by that authority if such a construction is a reasonable one The document in the present case is the standard charterparty used by the Baltic timber trade known as the "Baltime Charterparty of 1920," and the clause construed is the "cesser of hire" clause.

FOR CONSTRUCTION OF SUCH CLAUSES OF CHARTERPARTIES, see HALSBURY, 1st Edn., Vol. 26, p. 105, para. 183, and DIGEST, Vol. 41, pp. 358-361, Nos. 2074 2114.]

Cases referred to:

(1) *Giertsen* v. *Turnbull & Co.*, [1908] S.C. 1101; 41 Digest 360, (*g*).

(2) *Hogarth* v. *Miller, Brother & Co.*, [1891] A.C. 48; 41 Digest 360, *2091.*

(3) *Vogemann* v. *Zanzibar S.S. Co.* (1901) 6 Com. Cas. 257 (1902) 7 Com. Cas. 254; 41 Digest 362, *2101.*

(4) *Adelaide S.S. Co.* v. *R.*, [1923] 1 K.B. 59; 41 Digest 991, *8755.*

(5) *Tennants (Lancashire), Ltd.* v. *Wilson (C. S.) & Co., Ltd.*, [1917] A.C. 495; 12 Digest 396, *3216.*

(6) *Arild (Owner)* v. *Société Anonyme de Navigation Hovrani*, [1923] 2 K.B. 141; 41 Digest 360, *2090.*

Appeal from a judgment from Goddard, J., delivered on July 3, 1935, in favour of the charterers, on a special consultative case stated by arbitrators under the Arbitration Act, 1934, s. 9 (1) (*a*).

The charterers, the Anglo-Soviet Shipping Co., Ltd., by a charterparty dated May 14, 1934, chartered the S.S. "Horden" from the owners, the Tynedale Steam Shipping Co., Ltd. The charterparty was in the form known as the "Baltime, 1920," the Uniform Time Charter, 1912, as revised 1920, of the Baltic and White Sea Conference. The relevant conditions were :—

Clause 2.—Owners to provide and pay for all provisions and wages, for insurance of the steamer, for all deck and engine room stores and maintain her in a thoroughly efficient state in hull and machinery during service. Owners to provide one winchman per hatch. If further winchmen required, or if stevedore refuses to work with the crew, charterers to provide and pay qualified winchmen from land.

Clause 3.—Charterers to provide and pay for all coals . . . and all other charges and expenses whatsoever . . . the steamer to be fitted and maintained with winches, derricks and ordinary runners capable of handling lifts up to three tons.

Clause 10.—In the event of loss of time caused by dry-docking or by other necessary measures to maintain the efficiency of steamer, or by deficiency of men or owners' stores, breakdown of machinery, damage to hull or other accident preventing the working of the steamer and lasting more than 24 consecutive hours, hire to cease from commencement of such loss of time until steamer is again in efficient state to resume service. Should steamer be driven into port, or to anchorage by stress of weather, or in the event of steamer trading to shallow harbour, rivers or ports with bars, or in case of accident to cargo, causing detention to steamer, time so lost and expenses incurred shall be for charterers' account even if caused through fault or want of due diligence by owners' servants.

Clause 12.—Owners only to be responsible for delay in delivery of the steamer or for delay during the currency of this charter for loss or damage to goods on board, if such delay or loss has been caused by want of due diligence on the part of owners or their manager, in making steamer seaworthy and fitted for the voyage or any other personal act or omission or default of owners or their manager. Owners not to be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect of or default by owners' servants.

Charterers to be responsible for loss or damage caused to steamer or owners by goods being loaded contrary to the terms of this charter or by improper or careless loading or stowage of goods or any other improper or negligent act on their part or that of their servants.

The "Horden" was sailing from Archangel to Liverpool with a deckload of timber properly loaded and stowed and securely lashed. There was no negligence in navigation. When coming up the Mersey on Sept. 17 in heavy weather, the vessel listed sharply to port, and, a severe squall striking her from starboard, the foredeck on the port side and the foremast fell overboard. She moored in a temporary berth for two days and discharge was commenced by means of shore cranes, as the forward derricks had gone. She was then docked, and discharged from the after-end by means of her winches. Two floating derricks were

hired for the discharge of the forward end and, as these had to be berthed between the vessel and the quay, discharge from the after-end had to cease. Discharging therefore took six days two hours longer than it would normally have taken.

The shipowners claimed hire for the period during which the vessel was delayed, and also claimed that the cost of hiring the floating derricks was for the charterers' account. The charterers said that they were not bound by the charterparty to pay the hire for the period of delay, and that the shipowners were liable for the hire of the floating derricks. The parties submitted their dispute to arbitrators, who found the facts stated above and stated the following special case for the opinion of the court :—

(*a*) Whether upon the true construction of the charter and upon the facts as herein found, the shipowners are entitled to hire for the vessel in respect of the time occupied in discharge ; and (*b*) whether the additional costs of discharge, etc., are for account of the shipowners or the charterers.

On July 3, 1935, GODDARD, J., found in favour of the charterers on both questions. He said that the shipowners were obliged to provide and maintain the winches ; if there were no winches, or none which would discharge the fore part of the ship, the ship was not in a working condition. He referred to *Hogarth* v. *Miller* (2), where the ship was held capable of working while she was alongside : in the present case the ship was not capable of working in the sense of being able to do what was necessary to discharge the cargo when she was lying alongside. Moreover, in *Hogarth* v. *Miller* the ship was held to be incapable in working on her voyage because, although she had one low-pressure boiler working, she had to be towed and was not independently efficient. The winches of the "Horden" were entirely the owners' concern, and the expense was incurred through the failure of the ship to fulfil the obligation of the owners to provide winches which would discharge the ship.

The shipowners (the claimants before the arbitrators) appealed.

C. T. Le Quesne, K.C., with him *Cyril Miller*, for the appellants.

A. T. Miller, K.C., and *H. I. P. Hallett, K.C.*, with them *Stephen Chapman*, for the respondents.

Le Quesne, K.C.: The cause of the damage is not material. He referred to *Adelaide S.S. Co.* v. *R.* (4), and distinguished *Hogarth* v. *Miller* (2). In that case the question was whether the ship came on to hire again for the voyage home and the discharge period in harbour. It was held that she was not on hire for the voyage, but that she was for the discharging time, because during that time the engines were not working. Here the question is whether the vessel ever went off hire. Clause 10 of the charterparty only provides

for cesser of hire when the working of the ship is completely prevented. It relates to complete failure to render the charterparty service. If it had ever been intended that clause 10 should cover what Lord Bramwell (in *Hogarth* v. *Miller* (2)) called "partial loss," the draftsman would not have used in line 83 the words "preventing the working of the steamer." He would have used such words as "preventing the full working of the steamer," or "hindering the working of the steamer." In clause 10 the words "loss of time" and "time so lost" mean what Lord Bramwell called total loss of time, which never covers a partial loss of service.

Counsel referred to *Tennants* (*Lancashire*), *Ltd.*, v. *Wilson & Co.*, *Ltd.* (5).

In holding that the shipowners, the appellants, did not maintain the derricks as required by the charterparty in clause 3, the learned Judge took a wrong view of the meaning of the word "maintain." There is here no absolute liability.

Lord Roche: In *Vogemann* v. *Zanzibar S.S. Co.* (3) an express stipulation to maintain was held to be a warrant at risk always to maintain: the liability was absolute.

Le Quesne, K.C., referred to *Arild* (*Owner*) v. *Société Anonyme de Navigation Hovrani* (6), and *Giertsen* v. *Turnbull & Co.* (1). The damage was not a breach of contract by the shipowners.

A. T. Miller, K.C.: The learned Judge took the right and usual view of the decision of the House of Lords in *Hogarth* v. *Miller* (2). In the present case the owners take upon themselves the obligation to maintain the vessel in a thoroughly efficient state in hull and machinery during service. In return they get hire. If efficient service ceases, hire also should cease. That is in keeping with the general nature of the bargain and with commercial good sense. In *Hogarth* v. *Miller* (2) Lord Morris goes so far as to say that, though the ship was fit for the purpose of working cargo in port when she got there, even so there could be no payment of hire, because her owners had not yet restored her to that fitness of condition which was the primary matter in their obligation to the charterers The other noble Lords did not press their views to far, but this is what was in their minds. Clause 10 either means that the hire must be paid, however much the vessel falls below the contemplated standard of efficiency, so long as she can render some service; or that it stops when she falls below the contemplated efficiency and cannot perform the contemplated service. The learned author of Scrutton on Charterparties took the view (art. 146) that *Hogarth* v. *Miller* (2) turned on the question: "Was the ship efficient?" This court should not reverse a practice and a decision of such long standing.

Le Quesne, K.C., in reply: If hire is withheld, it should be only for the six days two hours more than the normal time which the ship took to discharge.

LORD ROCHE : To submit that cesser of hire should depend on time actually lost is to argue in the teeth of the decision in *Vogemann* v. *Zanzibar S.S. Co.* (3), and of the judgment of LORD HALSBURY, L.C., in *Hogarth* v. *Miller* (2).

Le Quesne, K.C.: The owners should have hire for the two days the ship was in temporary berth, because this detention was caused by "accident to cargo" under clause 10.

LORD ROCHE : This is an appeal from a decision of GODDARD, J. The matter came before the learned Judge in the form of a special case stated by arbitrators under the Arbitration Act, 1934, s. 9 (1) (*a*). That Act provides for the means whereby such a case as this is can reach this court. Under the former Arbitration Act, until it was supplemented by this Act of 1934, a case of this nature, which is what is called a "consultative case," could not reach this court, but under the 1934 Act it is provided that, by the leave of the Judge, which was granted in this case, a consultative case may reach this court. So this case has reached this court; it has here been very fully and very ably argued, and we are in a position now to give our decision.

The arbitration was one between the Tynedale Steam Shipping Company, Ltd., who were the owners of a steamship called the "Horden," and the respondents, the Anglo-Soviet Shipping Company, Ltd., who chartered that ship under a time charter. The time charter contained a provision for what is called the cesser of the time hire, and it contained a large number of other provisions which I shall have to refer to more specifically. What happened is found in the special case and is detailed in a protest which is appended to the special case and may be referred to as containing the true facts of the case.

I will now indicate quite generally what the material clauses are before considering them in detail or stating the facts. The material clauses are that the owners of the ship are to provide what I may call "winch power" for the purpose of discharging the ship. The winch power necessarily includes for its efficiency a derrick to be swung or worked by the winch. In this case the derricks are affixed to the masts, which are no longer masts in the sense of being necessary for navigation but are necessary for the discharge. The cesser clause provides that, if there is a breakdown of machinery, damage to hull or other accident preventing the working of the steamer, and a loss of time results from that, then time hire is to cease.

That being the general nature of the stipulations in the charterparty, I can now state shortly the facts as found by the arbitrators. They are that when the vessel was returning from a Russian port and proceeding to Liverpool laden with a cargo of timber, owing to weather and heavy squalls striking the vessel the deck cargo was affected, there was a heavy list to starboard and some of the starboard deck load fell over-

board. In the course of that happening there was severe damage to the mast. In those circumstances the vessel could proceed all right as regards finishing her voyage, but when she got into port she could in substance only discharge half of the vessel at a time. The forward part of the vessel could not be discharged at all by her own winches, owing to this accident, and shore or floating craft had to be hired, and were hired, by the charterers in order to carry out the discharge at the port. Those craft, of course, had to lie between the vessel and the quay, with this result: that when she lay alongside the quay for discharging the after part of the cargo, she could not discharge the forward part of the cargo because the floating derricks and cranes could not get between her and the quay. When, on the other hand, the forward part was discharging by means of the floating cranes between the vessel and the quay, she could not discharge the after part, because the after part could not be alongside, as was necessary for the purpose of discharging. So the finding in the case on this point is that the discharge at the fore-end was impossible by reason of there being no mast. In paras. 13 and 14 of the case the arbitrators found what I have said as regards the discharge.

In those circumstances, two disputes arise between the parties. The first is, that the charterers say that hire ceased at the time they wanted to discharge, and she could only discharge half the ship at a time—that is to say, quite inefficiently. The shipowners contend that so long as she was efficient or able to discharge, however slowly, in that condition, the cesser of hire clause under its terms was not in operation.

The charterers also contend that the expense of hiring the shore crane, or floating craft, should fall upon the shipowners and not upon themselves. The learned Judge has found both those points in favour of the charterers, and has held that hire ceased at the time of discharge and that the charterers are entitled to recover the sum of £90 odd for the cost of hiring the floating cranes.

Now I will deal with the second point first, because it is so much the easier of the two, in order to get it out of the way. The learned Judge has apparently held that the charterers were entitled to recover this sum from the shipowners because of the stipulation in clause 3, line 40, on the second page of the charterparty: "The steamer to be fitted and maintained with winches, derricks, wheels and ordinary runners capable of handling lifts up to three tons," and so on. Now it must be, I think, that the learned Judge was persuaded to hold that there was some breach of that stipulation on the part of the shipowners, and that the sum of £91 in question should be recovered by way of damages. As to that, it is sufficient to say that in my judgment there is no doubt that this stipulation with regard to the winches and with regard to the ship generally, in clause 2 of the charterparty, that the owners are to "maintain her in a thoroughly efficient state in hull and machinery during service,"

do not constitute an absolute engagement or warranty that the shipowners will succeed in so maintaining her whatever perils or causes may intervene to cause her to be inefficient for the purpose of her services. On the contrary, there is a very wide exception clause, namely clause 12 of the charterparty, lines 96 and 97 :

> Owners not to be responsible in any other case nor for damages or delay whatsoever and howsoever caused even if caused by the neglect or default by owners' servants.

The engagement of the shipowners is this : that if accidents happen or events arise to cause the ship to be inefficient or the winches to be ineffective and out of action, they will take all reasonable and proper steps that reasonable men could take to put them back again. There is no evidence whatever—indeed, the findings of fact are to the contrary—that there was any such breach of that obligation on the part of the shipowners. If any authority in support of that interpretation of the clause were necessary, I think it is to be found in a decision of the Inner House in Scotland, in the case of *Giertsen* v. *Turnbull & Co.* (1). The head-note on this point of that case is as follows :

> Held : (1) that an article in a charterparty binding the owner "to provide and pay for the necessary equipment for the proper and efficient working of the said steamer, maintaining her in a thoroughly efficient state for and during the service," placed the expense of maintaining the vessel in an efficient state on the owner, but did not bind him to keep the vessel in that state.

That is sufficient to dispose of that point on the ground on which the decision was based in the court below. But before this court Mr. A. T. Miller has sought to support the judgment on that point by a different line of argument. He has said that the expense of providing the winches and derricks is thrown, under the charterparty, upon the owners of the ship. By the agency clause of the charterparty, clause 8, line 59, it is provided : "Captain to be under the orders of charterers as regards employment agency or other arrangements." He said that the charterers, as agents of the ship, duly authorised under that clause, caused this machinery to be hired, and that, the hire having been effected by persons authorised to be agents of the shipowners, the shipowners ought to pay the bill. That clause about agency has a well known and much more limited content than this argument implies. The stipulation that the charterers' agents are the agents for the ship means that they are agents with regard to customs and matters of that sort ; it certainly does not give authority to the charterers' agents to hire machinery to do work, if it be the work of the ship, without asking the shipowner, or the master, anything about it. Here there is an express finding in the case to the following effect, in para. 21 :

> All the discharging arrangements were carried out by the charterers' agents, Messrs. L. W. Morland & Co., and neither the shipowners nor the master interfered in any way either with the arrangements or the performance of the discharge.

The whole case is quite consistent with this view : that the charterers wanted their cargo and wanted it badly, and provided perfectly business-like means for getting it sooner than they would have done had they let the shipowners discharge piecemeal, prepare the derrick, and then proceed with the discharge. This claim put under this head can only be a claim for money paid for, or at the request of, the shipowners. In those circumstances there is a clear finding that there was no express request, and it seems to me that there is no material whatever upon which the request ought to be, or can be, implied. For that reason the judgment on that point is, in my opinion, erroneous and must be reversed.

Now with regard to the second point, namely the cesser of hire. The argument of Mr. Le Quesne, which he put before us perfectly clearly and very fully, was that this ship was partly efficient and that the clause in question as to the cesser of hire, which I had better now read, only relates to complete or total prevention from working the ship. The clause is as follows :

> In the event of loss of time caused by dry docking or by other necessary measures to maintain the efficiency of steamer or by deficiency of men or owners' stores breakdown of machinery damage to hull or other accident preventing the working of the steamer and lasting more than 24 consecutive hours, hire to cease from commencement of such loss of time until steamer is again in efficient state to resume service.

He says that the words are "preventing the working of the steamer," that an interference with the working is not a prevention, and that the most that happened here was that the ship discharged half as fast, or thereabouts, as it would have done, if there had been no damage. There is one fatal objection to that argument, and that is that it has come about forty-five years too late. In the year 1890 a clause which I am unable in any way to distinguish from the present clause came up for decision in the Court of Session in Scotland, and by the House of Lords on appeal from the Court of Session. The case I refer to is the case of *Hogarth* v. *Miller, Brother & Co.* (2). I say that the language of that clause cannot in my view be distinguished from the language of the clause in this case. The only difference was that the word "stopped" occurred in that case instead of the word "preventing" in this case. I am unable to find any other distinction. Lord Halsbury, L.C., at pp. 53 and 54 says this :

> That clause of the contract which has to be interpreted is in these terms, and each part of it, I should say, ought to be looked at with care and with reference to the words which are found associated with it in the particular instrument which we have to construe. It is, "That in the event of loss of time." That is the leading and guiding principle by which we are to ascertain what it is with reference to which the succeeding words are used. What the hirer of the ship is guarding against by this contract with the owner of the ship is, that he is not to pay during such

period of time as he shall lose (that is, lose time) in the use of the ship by reason of any of the contingencies which this particular clause contemplates.

Then he reads the clause again.

The language is consonant with what I have indicated to be the general intention of the parties in entering into this part of the contract. In the first place, it is "in the event of loss of time," and then the parties proceed to shew that that contingency which is to give rise to the actual operation of the clause is that the working powers of the vessel are interfered with, and "the working of the vessel is stopped for more than forty-eight consecutive working hours," and upon that there is to be a cesser. What the parties to this contract contemplated was this: The hirer of the vessel wants to use the vessel for the purpose of his adventure, and he is contemplating the possibility that by some of the causes indicated in the clause itself, namely,

—then he reads them, amongst others, "breakdown of machinery"—

the efficient working of the vessel may be stopped, and so loss of time may be incurred; and he protects himself by saying, that during such period as the working of the vessel is stopped for more than forty-eight consecutive hours, payment shall cease; and now come the words upon which such reliance is placed: "until she be again in an efficient state to resume her service."

Now, having read those words from LORD HALSBURY, it is, I think, necessary or convenient to state again what was in question in *Hogarth* v. *Miller* (2). In *Hogarth* v. *Miller* (2) the vessel had broken down at sea. She went into a port of refuge and then waited to see whether she could repair. During that waiting period there is no question but that the vessel was off hire. Then a tug was hired, and she went on her way crippled with the aid of the tug, and she could not have got home without it. The shipowners contended that she was working an engine and helping the tug. She was not stopped altogether; she was working. The argument was presented, I think, very much as Mr. Le Quesne has presented it here. We have not so full a representation of Mr. Finlay's argument as we have knowledge of Mr. Le Quesne's argument, but I think it was substantially the argument we have heard to-day. That was the argument which, as regards the voyage, was rejected by the majority of the Lords who gave judgment. With regard to another part—namely, the discharge when the vessel in that case got to the German port which was her port of discharge—although she was unable to steam she was fully able to discharge as fast as she would have discharged had the accident not happened. It was held that there she was on hire, because she was efficient for the service which was required of her.

That is the converse of this case. Here, the mast being damaged did not prevent or hinder the ship steaming, but it did hinder or prevent her discharging in the sense that prevention was construed in the House of Lords in *Hogarth* v. *Miller* (2) as preventing discharge or the working of the ship happening in accordance with the contract. That is the full

point, it seems to me, between the parties in this case, as it was between the majority of the House in the case of *Hogarth* v. *Miller* (2) and the dissenting Lord Bramwell. Let me go a little further into the judgments in order to make good my point. I recognise that the facts in *Hogarth* v. *Miller* (2) were in a sense different to those in this case. It was held there that the ship could not have got to a port without a tug. Mr. Le Quesne says in this case that they could have discharged slowly and did discharge slowly, but that they did discharge. I am afraid that the answer to that part of the case is that it is a finding of fact. There is a finding of fact here that discharge of the forward part of the ship was impossible by the ship herself by means of her winches and derricks. Lord Watson, in dealing with the matter, says at p. 60 :—

> The first question which arises is this : Was the vessel, when she started under tow for Harburg, in an efficient state to resume her service within the meaning of the contract ? I have no hesitation in answering that question in the negative. The service contemplated was a service to be performed by the vessel without foreign aid, the means of propulsion through the water being her own machinery.

Then when he comes to the second part of the case, namely, the discharge at Harburg, and deals with her efficiency for that purpose, what he says is this :—

> It appears to me, for the reasons which have been already indicated by the Lord Chancellor, that from the moment when she reached the pier at Harburg the vessel was in an efficient state to perform that part of the contract work for which she was hired, and for which she was in the possession of the respondents. Her steam-winches were in perfect order, and it humbly appears to me, that if charterers keep possession of a vessel which is in a thoroughly efficient state for all the purposes contemplated at the time by the contract, and required by them, they must, in terms of the contract, pay the stipulated hire.

Then the noble Lord goes on to examine the facts which, if the view contended for by the appellants were right, would have been wholly unnecessary to consider—namely, whether the discharge was slowed up ; and he decides that it was not slowed up. Therefore his previous conclusion is justified : that she was in a thoroughly efficient state for all purposes contemplated at the time of her being chartered. Lord Bramwell dissented in a very characteristic and vigorous fashion, and although Mr. Le Quesne sought to persuade us that the noble Lord was really only differing about the finding of fact, it is abundantly clear from the language that he used that he thought himself differing *in toto* from the other noble Lords in the matter of construction, because he says :

> My Lords, I cannot help thinking that most undue importance has been attached to the word "efficient."

Then he repeats that on p. 63 :

It seems to me, as I have said before, I am afraid more than once, that an undue importance is attached to the word "efficient." I think it is an example of *qui hæret in literâ hæret in cortice.*

That is what he said about it. Now LORD HERSCHELL'S opinion on this point is of importance, because his opinion was delivered after the opinion of LORD BRAMWELL. At the top of p. 64 he says :

I do not lay any special stress upon the word "efficient" in the phrase "efficient working of the vessel." If the word "efficient" had been left out and the word "working" had been the only word there, I think I should have come to the same conclusion as that at which I have arrived.

Then he says why, and in effect he says this : that you must contemplate what voyage or voyages were intended and what methods of propulsion were contemplated as the means of propulsion to be employed.

Now, converting that into the language necessary for the present purpose, you are to consider in the matter of discharge what means of discharge were contemplated. Answer : the winches and the derricks. Were those means of discharge available ? Answer : No, half of them were not. It seems to me that it follows from that reasoning that the vessel was not fit or able to work for the services required and stipulated for by the initial words of the charterparty, and in those circumstances two results follow. It was the duty of the owners then to put her back into an efficient state in hull and machinery for that purpose. Under clause 2 and under clause 10 events had happened which put into operation the cesser of hire clause. I need not read it again, but reference to the judgment of LORD MORRIS at p. 66 will show that the noble Lord took the same view as the other noble Lords who formed the majority of the House. That being the state of authority in the year 1891, reference has been made, and rightly made, to a most authoritative work, namely, the work of SCRUTTON ON CHARTERPARTIES. For this purpose reference can only properly be made as an authority to the judgment in *Hogarth* v. *Miller* (2). The late SCRUTTON, L.J., was responsible for the earlier editions of that work, and, with the greatest respect to the other living authorities, there has never been a greater authority on this branch of the law than the late Lord Justice. In every edition, we have been told, from the 6th onwards until the last for which he was responsible, which is the 11th—that is to say, from the 6th Edition, which is in 1910, until the 11th, which is in 1923—substantially these words have stood as part of the text of that well-known and rightly-esteemed work. I am reading from the 7th Edition at p. 325, under art. 146. (The articles are always the same whatever the edition, but the pages alter.) At p. 325 this paragraph occurs, after the author has set out the facts of *Hogarth* v. *Miller* (2) :

Held, that no freight was payable from the Canary Islands to the Elbe, as the ship was not in an efficient state ; but that hire was due for the time during which

she was discharging cargo at the port on the Elbe, as she was efficient for that purpose, though not for proceeding to sea as a steamer.

Be it noted that, as the ship was wholly broken down, she was not in an efficient state for her service. Then the note goes on :

> Hire ceases as soon as time begins to be lost by a stipulated cause ; it has not been decided whether, if damage prevent the working for more than twenty-four hours, hire ceases from the beginning or end of the period ; probably from the beginning.

Then follows a passage as to something which had not then been decided, but which has since been decided :

> Hire begins again, not when the ship is in the same position as when she broke down, but when she has been repaired, and is again efficient to resume her service. The charterer may therefore have to pay twice for part of the voyage. The ordinary clause does not provide for payment of *pro rata* hire for a ship partly efficient, as when a steamer, broken down, completes her voyage under sail, nor for the return of prepaid hire, in respect of that portion of time already paid for, during which the ship remains inefficient ; it is advisable to modify the clause to meet these points.

That is the highest possible authority to show what was thought and recognised as being the meaning and effect of the decision in *Hogarth* v. *Miller* (2). I should say, to avoid misconception, that that stands in every edition down to the present day, but inasmuch as the editors of those later editions are fortunately still living, the only use of that authority is to show that nobody has yet found a decision to the contrary of that doctrine, which I think was laid down in *Hogarth* v. *Miller* (2) and which Scrutton, L.J., thought was laid down by *Hogarth* v. *Miller* (2).

Now it is really sufficient to dispose of this case to indicate the reasons why I think on this part of the case the learned Judge was right and why the appeal fails. There are two matters to be added. We must only answer the questions put by the arbitrators, and it is important in answering them not to be ambiguous. The first question is :

> Whether upon the true construction of the charter and upon the facts as herein found the shipowners are entitled to hire for the vessel in respect of the time occupied in discharge.

Now it will be observed that the note in Scrutton on Charterparties to which I have already referred says this : that if the hire has already been paid for part of that period, then the charter cannot be effective. I do not know of any recent discussion of that matter, but I see no reason why that statement should not be regarded as correct. However that may be, if any part of this period is covered by hire already paid in advance, nothing that I am saying must be taken to indicate any view that the charterers may get it back again. The answer that I give is this : that upon the true construction of the charter and upon the facts as here found—that is to say, found in the case—the ship-

owners' right to be paid hire ceased in respect of the time occupied in discharge; that is to say, they should get no further than that during the continuance of that period.

That answer is really sufficient to dispose of the argument which was developed by Mr. Le Quesne in reply: namely, that there should be a sort of assessment of the amount of time lost by reason of the inefficiency, and that for that net loss of time so ascertained hire should be deemed to cease. With respect to that argument, it is sufficient to say that I regard every word which I have read from the judgments of LORD HALSBURY and the other noble Lords who formed the majority as negativing that argument, which in my view is opposed to the proper construction of the clause, that construction being a stipulation that, if certain events happen, then *ipso facto* hire is to cease and is not to begin again until that state of affairs has ceased to exist. The ascertainment of the net loss is something foreign to the clause as drawn.

A similar argument was negatived by a decision of this court in the case of *Vogemann* v. *Zanzibar S.S. Co.* (3), where the shipowner had the advantage of the construction which I regard as the true construction, inasmuch as he was made to pay for time when the ship, after being inefficient and after having repairs and becoming efficient again, was spending time in getting back to that position on the voyage which she had left to proceed to the port of refuge. That is to say, the shipowner got paid although time was being lost during that period owing to the breakdown; inasmuch as the events which led up to and constituted a claim for hire had ceased, hire began to run again.

I think that deals with all the points in the case. After the other members of the court have given their judgments we had better deal with the question as to costs, and hear what counsel may say upon that point.

SCOTT, L.J.: I agree with the whole of the judgment delivered by LORD ROCHE, and with a little hesitation only add one or two observations. In regard to the claim for the £90 odd for expenses incurred by the charterers in consequence of the breakdown of the ship's gear, the charter quite clearly prevents a recovery from the shipowner on the ground that they are damages for breach of charter, because the exception clause prevents any such claim being made. Mr. Miller's alternative presentation of the argument that the charterers may recover that amount as money paid by request, in my view quite ignores the limitations of the doctrine of claims for money paid at request. That form of action does not lie unless there is a request or authority express or implied. It is quite clear that there was no express request or authority here, and therefore there remains only the question of an implied authority or request. The principles stated on pp. 42 and 43 of the 3rd Edn. of BULLEN AND LEAKE make it quite apparent that a request will not be implied unless there is an exceptional position of obligation in one form

or another upon the defendant which is discharged by the plaintiff. Here nothing of the kind can be asserted, and consequently you get to the position stated on p. 43 of Bullen and Leake, which is this :

> Where the defendant is not liable to anyone but the plaintiff himself so that the payment by the plaintiff does not exonerate the defendant from any liability, the plaintiff, having been compelled to pay, must sue the defendant specially on the contract between them.

I therefore agree that on that claim the shipowner is under no liability.

As regards the major part of the charterers' hire, I entirely agree, as I have already said, with the judgment delivered, but I feel that the decision in the House of Lords in *Hogarth* v. *Miller* (2) did leave open, *qua* decision, the argument that has been addressed to the court here by Mr. Le Quesne, although I also agree with Lord Roche that the opinions expressed in that case go a very long way towards making the argument of Mr. Le Quesne impossible. Mr. Le Quesne submitted to us that in that case the House accepted as a principle that hire had ceased by reason of prevention within the meaning of the charter before the vessel reached the port of refuge at Las Palmas and before the voyage home with a tug assisting began. He said, therefore, that the House was not considering what caused the charter hire to cease, but what entitled the shipowner to say that the right to charter hire had re-attached. That argument had at first its attractions, but on further reflection, apart from the *obiter dicta*—to which we have to pay the very greatest possible attention in this court—which fell from their Lordships in the House of Lords, I do feel this very strongly : that from a commercial point of view the distinction between what causes the charter hire to go off and what causes it to come on again is, to the commercial man, a distinction which is rather apt to worry him ; and I am very loth to construe an ordinary commercial clause in a way that is not simple to the commercial mind if the clause can properly be interpreted in a simple way. And this clause, I think, can be interpreted simply, for this reason the clause provides that in the event of loss of time caused by damage to hull or other accident preventing the working of the steamer, then hire for a minimum length of time is to cease until the steamer is again in an efficient state to resume the service. As Lord Roche has said, the word "again" indicates the former state of the ship and the latter state of the ship. The state before she went off hire and the state to which she must have returned before she goes on hire again are intended to be the same. If one turns to clause 1 of the charterparty in which, following on the description of the ship which is given at the outset of the charter, it is laid down that the ship must be "in every way fitted for ordinary cargo service"; and if one has in mind the provision in clause 2 : "Owners are to maintain her in a thoroughly efficient state in hull and machinery during service," and that

in clause 3 : " The steamer is to be fitted and maintained with winches, derricks, wheels and ordinary runners capable of handling lifts up to three tons "—having all those three express provisions of the charter in mind, I think that the stress of clause 10 is on the words " the steamer," meaning the contract steamer, the steamer of the kind described in this contract, which is to be maintained in the manner expressly stated in the contract ; and that when, in substance, the steamer has ceased to be a steamer with those qualifications, then the charter hire goes off and will not re-attach until the steamer is again a steamer with those qualifications—subject always to this : that the qualifications necessary for work in port are not the same as the qualifications necessary for work at sea, as was pointed out by the House of Lords in *Hogarth* v. *Miller* (2). If you take that view, it is a simple interpretation of the clause from the point of view of the ordinary commercial man.

I am very much impressed by the fact that the late SCRUTTON, L.J., quite clearly has taken that view, and has repeated it in a series of editions of his book for which he was personally responsible over a long period of years, and that is a book which is known by all shipping lawyers in this country. All these common forms of charter are forms that are worked out with the assistance of the best shipping lawyers in London, in the light of works like that of the late SCRUTTON, L.J., and when you get a charter like the " Baltime Charter of 1920," which this is, one may assume it has been thought out on the lines of decided cases. It is very undesirable, therefore, to depart from the line of decisions, unless it is absolutely necessary to do so on account of the wording of the particular instrument compelling such a departure. For those reasons I agree with the judgment already delivered.

EVE, J. : I also agree entirely with the judgment pronounced by my Lords.

After argument the following order was made :—

Order of GODDARD, J., *varied. Questions for court answered as follows :* (a) *Upon the facts as found in the case, the shipowners' right to receive payments on hire ceases in respect of the time occupied in discharge ;* (b) *The additional costs of discharge, the subject-matter of the question, are for account of the charterers.*

Each side to pay its own costs in the court below. Costs of special case to be divided equally.

Respondents to bear one-third of appellants' costs of appeal.

Solicitors : *Sinclair, Roche & Temperley*, agents for *Botterell, Roche & Temperley*, Newcastle-on-Tyne (for the appellants) ; *Pettite, Kennedy, Morgan & Co.* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

MORGAN *v.* INCORPORATED CENTRAL COUNCIL OF THE GIRLS' FRIENDLY SOCIETY.

[King's Bench Division (Horridge, J.), **February 20, 1936.**]

Negligence—Independent contractor—Lift gate left open.

Plaintiff was on his way to visit the tenants of offices in a building owned by the defendants. The door leading to the lift was partially open, and the plaintiff thinking that the lift was there, stepped through the door, fell down the shaft and was injured. In an action for damages for the injuries received the defendants contended that they had contracted with independent contractors to keep the lift in good working order, and that they did not know and could not reasonably be expected to know that the lift was out of order :—

Held : (i) the plaintiff was a licensee of the defendants.

(ii) the negligence was that of the independent contractors and not of the defendants.

(iii) there was no trap of which the defendants knew or ought to have known.

(iv) there was no contributory negligence on the part of the plaintiff.

[**EDITORIAL NOTE.** The landlord of flats or office premises is bound to use reasonable care that those parts of the premises which are necessary for the convenience of all the tenants, and which the landlord is assumed to retain in his own possession, are in a fit condition. He may be liable for damage resulting from failure to use such care, not only to the tenants but also to persons on the premises by their express or implied permission. But this liability does not extend to the common staircase unless the defect is in the nature of a trap or contains a concealed danger. The landlord's liability in regard to a lift is even less, for lifts are usually supplied in addition to stairs and are merely for the convenience of the tenants. A lift must, however, be suitably constructed in the first instance. If this is done, the landlord is not liable for accidents due to the nature of the lift itself, nor is he liable for accidents due to its management unless he has retained the control of it. Where, however, there is a concealed danger of which he knows or ought to know, he incurs the usual liability to persons suffering injury who are on the premises as invitees or licensees.

As to the Liability of a Landlord in Regard to Flats and Offices, see HALSBURY, Hailsham Edn., Vol. 20, pp. 337-338, paras. 405-406 : and for the Cases, see DIGEST, Vol. 31, pp. 97-102, Nos. 2366-2397.]

Cases referred to :—

(1) *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74 : 36 Digest 37, *213*.

(2) *Hughes* v. *Percival* (1883), 8 App. Cas. 443 , 42 Digest 982, *124*.

(3) *Holliday* v. *National Telephone Co.*, [1899] 2 Q.B. 392 ; 34 Digest 163, *1271*.

(4) *Addie, R., & Sons (Collieries)* v. *Dumbreck*, [1929] A.C. 358 ; Digest Supp.

Action for damages for injuries received in the circumstances set out in the judgment.

Wilfred Bennett for the plaintiff.

Macaskie, K.C., and *S. H. Levine* for the defendants.

Horridge, J. : On July 30, 1935, the plaintiff went to these premises, passed through the hall and the vestibule, and, seeing that the lift door was partially open, stepped into the open lift. The cause of

the condition of the lift was the negligence of the Express Lift Co., in not discovering that the lift was not in order. On the authority of *Fairman* v. *Perpetual Investment Building Society* (1) in the House of Lords, it seems that the plaintiff in this case was a licensee and not an invitee. He was an invitee of the firm of architects whose office he was going to, but not an invitee of the landlords, the defendants. I find as a fact that the light was on in the vestibule. That being so, the main defence is that of defence of independent contractor. I am satisfied that the Express Lift Co. were independent contractors, and that it was their duty to have discovered this defect. If they were independent contractors, the relationship of master and servant does not exist between defendants and themselves, and therefore the defendants are not liable for the acts of the contractors unless they can bring themselves within any known exceptions. (*Hughes* v. *Percival* (2); *Holliday* v. *National Telephone Co.* (3)). This case is an ordinary case of an independent contractor. The negligence was that of the independent contractor. Notwithstanding that, the defendants may be liable on other grounds. First it is said that they ought to have found the defect out. I do not agree. They employed people who knew better than they about lifts. I do not think the defendants were guilty of any default. Having found that the plaintiff was a bare licensee, the defendants' whole duty was as described by LORD HAILSHAM in *Addie, R., & Sons (Collieries)* v. *Dumbreck* (4), at page 365. In this case the defendants created no trap. The trap was not discovered by the people who ought to have discovered it. No concealed danger existed of which they knew or ought to have known, because they employed competent people to advise them.

I ought also to deal with the question of contributory negligence. The plaintiff was not guilty of contributory negligence in assuming that the lift was there. I think the remarks of LORD WRENBURY in *Fairman* v. *Perpetual Investment Building Society* (1) at page 96 are very much to the point.

Judgment for the defendants with costs.

Solicitors: *Malcolm Slowe* (for the plaintiff); *Berrymans* (for the defendants).

[*Reported by* FRANK ROWE, ESQ., *Barrister-at-Law.*]

Re AYNEK SYNDICATE, LIMITED.

[Chancery Division (Bennett, J.), **February 26, 1936.**]

Companies—Winding up—Proof—Rejection—Appeal.

A claim was made against a company in liquidation for damages. The liquidator issued a summons to have it determined whether the claims should be allowed and the judge made an order for an enquiry into the amount of damage sustained and that the claimant be permitted to prove for the sum so ascertained. The damages were so ascertained by the registrar and a proof carried in. The liquidator rejected the proof on the ground that a shareholder, while retaining his shares, cannot claim damages in respect of any loss in respect of his shares :—

Held : this objection was too late. It should have been taken on the hearing of the summons or on appeal therefrom.

[**EDITORIAL NOTE.** Generally speaking, trustees in bankruptcy and liquidators are allowed a wide latitude in objecting to claims in order that the rights of creditors may be fully protected. This rule is here in conflict with the rule that a party must bring forward all his claims or defences when the matter is before the court or be estopped from bringing further proceedings. In this case the latter rule prevailed and it would appear that a liquidator cannot reopen a proceeding in a winding up, if he has omitted to carry in all his objections. He can, of course, in general reopen proceedings before the winding up.

For Appeal from Rejection of Proof, see HALSBURY, Hailsham Edn., Vol. 5, p. 692, para. 1157, and for Cases, see DIGEST, Vol. 10. p. 951, Nos. 6513-6517.]

Cases referred to :

(1) *Re Van Laun, Ex p. Chatterton*, [1907] 2 K.B. 23 ; 4 Digest 326, *3058.*

(2) *Re Home & Colonial Insurance Company*, [1930] 1 Ch. 102 ; Digest Supp.

Application against the liquidator's rejection of a proof in a voluntary liquidation. The facts are fully set out in the judgment.

J. F. Bowyer (*H. S. G. Buckmaster* with him) for the applicant.

H. A. Rose for the liquidator.

Rose : The liquidator is not relieved from the necessity of examining the proof. There can be no damages recovered under a void agreement, and there can be nothing recovered by a shareholder who has retained his shares. That is, he cannot claim for damages in respect of his shares. Liberty has been given to prove, but a liquidator enjoys the same authority as a trustee in bankruptcy and a judgment does not necessarily bind the trustee. The liquidator must approach the matter as if there had been no judgment. [He referred to *Re Van Laun* (1) and *Re Home and Colonial Insurance Co.* (2).]

Bennett, J. : This is an appeal by the Royal Sovereign Pencil Co., Ltd., against the decision of the liquidator rejecting the applicant's proof for the sum of £3,058 in the liquidation. I think they are entitled to be admitted to prove, that sum having been found due by a certificate made by the Registrar under an order made by Eve, J.

The applicant's claim arises under an agreement of Aug. 29, 1932, to which the company now in liquidation were parties of the first part and the Royal Sovereign Pencil Co., Ltd., were parties of the fifth part. The purpose of the agreement seems to have been to provide money for the Aynek Co., Ltd., to fund certain debts and to provide a supply of material to be used in the manufacture of pencils by the Royal Sovereign Pencil Co., Ltd., and another pencil manufacturing company. Clause 3 of the agreement provides that the Royal Sovereign Pencil Co., Ltd., should apply for 6,200 shares in Aynek Co., Ltd., to be paid for in cash. Clause 4 contains a provision that the other company should undertake that they would not, after a certain time, in any way, directly or indirectly, engage or be interested in any business competing with the Aynek Co., Ltd., and in the event of their committing any breach of that provision, they should pay the Aynek Co. a sum of £500 as liquidated damages, and not in the nature of a penalty.

After the agreement had been entered into, the other pencil manufacturing company referred to committed a breach of the agreement of Aug., 1932, and engaged or interested themselves in the business of preparing material for the manufacture of pencils, in competition with Aynek & Co. who thereupon, in Nov., 1933, brought an action in the Chancery Division of the High Court, claiming an injunction to restrain them from competing. The action was tried before CLAUSON, J., who dismissed it on the ground that the agreement was unreasonably in restraint of trade. Shortly after that the Aynek Co. went into voluntary liquidation. Claims were made against the company by certain parties to the agreement, including the Royal Sovereign Pencil Co., Ltd., and as the agreement was void they were entitled to make claims as creditors. On Feb. 14, 1935, the liquidator issued a summons in the winding up of the company, asking that it might be determined whether the respective claims ought or ought not to be allowed. That summons came before EVE, J., in July, 1935, and an order was made (*inter alia*) that an enquiry be made as to the amount of damage suffered by the Royal Sovereign Pencil Co., Ltd., by reason of the said agreement having become void, and it was ordered that the respondents be permitted to prove in the liquidation for the amount found to be due. There was no appeal from that order. On Dec. 18, 1935, it is certified that the Royal Sovereign Pencil Co., Ltd., had suffered damage and the amount was assessed at £3,058. That certificate has become binding. In respect of the sum awarded by that certificate, the applicants put in their proof. It was rejected by the liquidator on the ground that a shareholder in a company, while retaining his shares, cannot claim damages in respect of any loss in respect of his shares and accordingly in the winding up, the Royal Sovereign Pencil Co., Ltd., could not claim any sum out of the assets. This might have been urged before EVE, J., or it might

have been urged before the Court of Appeal. Or it might have been urged on a summons to vary the certificate of the learned Registrar. If the liquidator chooses to allow the order of Eve, J., to stand unchallenged and to allow the Registrar's certificate as to damages to stand unchallenged, it is too late for the liquidator to set up this ground against a creditor who becomes a creditor under an order and under a certificate, on a proof in the liquidation. It is wholly unreasonable to attempt then to investigate matters which ought properly to have been investigated in proceedings to which the liquidator himself was a party at an earlier stage. There must be an end of litigation sometime, in the interests of everybody. There might have been a way of deciding the matter in either of the two methods I have indicated. It is too late to alter the matter now. I hold the liquidator improperly rejected the proof and I make an order that he admit the applicant to prove for £3,058, and to pay the costs of this summons.

Solicitors: *Clifford-Turner & Co.* (for the applicants); *Anstey & Co.* (for the liquidator).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

JENNINGS *v.* STEPHENS.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.)
February 5, 11, 12, March 11, 1936.]

Copyright—Performance in public—Copyright Act, 1911 (*c.* 46), *s.* 1 (2).

The Duston Women's Institute was a village institute holding monthly meetings of a social or educational nature for the purpose of encouraging music, drama, and dancing. No charge was made for admission other than an annual subscription of 2*s.*, which included membership of the Institute. At one of such meetings a play was performed by and for members only, and no guests or members of the public were in fact admitted :—

HELD : this was a performance in public within Copyright Act, 1911, s. 1 (2).

The true criterion is the character of the audience, which must be a domestic or *quasi* domestic audience, and the following are immaterial : (i) number present ; (ii) presence or absence of visitors ; (iii) payment or non-payment of performers ; (iv) whether the performers are members of the domestic circle or strangers ; (v) whether or not a charge is made for admission.

[**EDITORIAL NOTE.** This case fully considers the question of what performances are public performances within the meaning of the Copyright Act, 1911, s. 1 (2). The real difference, it would appear, between a performance in private and in public is that in the former case the entertainment forms part of the domestic or home life of the person who provides it, and this may be so although there are guests present. In the latter case the entertainment forms part of the non-domestic or outside life of the audience, and is in no sense any part of their domestic life. The payment or non-payment of the performers and presence of strangers or guests are immaterial so long as the performance is part of the domestic life of the giver of it. It is not essential that the performance should be given in the home of such giver, it may very well be that he hires a hall or other building for the occasion.

FOR THE LAW, see HALSBURY, Hailsham Edn, Vol. 7, p. 572, para. 888, and FOR THE CASES, see DIGEST, Vol. 13, pp. 214, 215, Nos. 501-510.]

Cases referred to :

(1) *Duck* v. *Bates* (1884), 13 Q.B.D. 843 ; 13 Digest 214, *507*.
(2) *Lee* v. *Simpson* (1847), 3 C.B. 871 ; 13 Digest 214, *506*.
(3) *Harms Incorporated and Chappell & Co.* v. *Martan's Club*, [1927] 1 Ch. 526 ; Digest Supp.
(4) *Performing Right Society* v. *Hawthorn Hotel (Bournemouth), Ltd.*, [1933] 1 Ch. 855 ; Digest Supp.
(5) *Farmer* v. *Cotton's Trustees*, [1915] A.C. 922.

APPEAL from a decision of CROSSMAN, J., in favour of the defendant in the action. The facts and arguments are fully stated in the judgment.

F. P. M. Schiller, K.C., and *E. J. Macgillivray*, for the appellant.

J. M. Gover, K.C., and *J. V. Nesbitt*, for the respondent.

Lord Wright, M.R.: This appeal raises a question on the words of the Copyright Act, 1911, s. 1 (2), which gives the owner of copyright in a dramatic work the sole right of performing the work or any substantial part thereof in public. The appeal turns on the meaning and effect on the facts of the case to be given to the words "in public."

The facts are not in dispute. The plaintiff is the authoress and owner of copyright in a play in one act, first produced in London in 1914, and entitled "The Rest Cure." The defendant is the President of the Overstone and Sywell Dramatic Society, who gave a performance of "The Rest Cure" on Feb. 23, 1933, at the Duston Women's Institute. As this performance was without the plaintiff's licence, it is complained that it constituted an infringement of the plaintiff's copyright. The defendant says that the performance was not in public.

The Duston Women's Institute was formed under the rules of the National Federation of Women's Institutes, which represents the union of all Women's Institutes in England and Wales, in pursuance of a movement that was started in Great Britain in 1915; there are now in England and Wales more than 5,000 Institutes, with an average membership of about sixty. Each Institute is a separate and independent body, though the Federation has in certain events the power to dissolve an Institute, and prescribes a general body of rules to regulate the formation of Institutes, and each member of an Institute is required to sign a declaration to pay (*inter alia*) an annual subscription and to conform to the rules laid down by the Federation.

The general function of the Institutes is to hold monthly meetings of a social or educational nature, in particular to encourage music, drama and dancing. Every female inhabitant above a certain age in the village in which an Institute is formed is expressly or tacitly invited to become a member.

The Duston Women's Institute had at the material time a membership of 109. Duston is a village on the outskirts of Northampton, about two miles from the centre of the town. It has a population of about 2,095, of whom 1,085 are females, though the adult female population is not stated.

The meeting on Feb. 23, 1933, was a regular monthly meeting; it took place in the Village Institute or Village Hall; the Women's Institute had acquired the use of this hall for its monthly meetings. There were present on that occasion 62 members. No charge was made for admission, but each member had paid her annual subscription of 2*s*., and there was also what is called an American Sale; this means that members bring with them parcels containing goods worth 3*d*. each, each of which can be purchased by those present on payment of 3*d*.; the aggregate of these sums goes to the Institute. At the meeting in question 13*s*. was realised in that way. The proceedings consisted of tea, which was

provided by certain of the members, all of whom take that duty in turns ; after tea there was, among other things, the performance of "The Rest Cure" and of another play called "Mechanical Jane." The performers were members of the Institute of a neighbouring village or villages called Overstone and Sywell. The performers received no fee, but gave the performance as a return for some services rendered to their Institute by the President of the Duston Institute. They made it a condition that no one should be present save members. They made this condition because a circular had been sent round by the Federation to the Institutes, advising that the presence of visitors (in which category was to be included members from a neighbouring Institute, or the lecturer if not a member of the particular Institute) changed the character of a performance from a private to a public one. It was immaterial that no charge was made for admission. The circular advised that royalties must be paid on performances given at group conferences, council meetings, exhibitions, etc. At monthly meetings at which no visitors were present, the performance, it was advised, was a private performance of a purely domestic character on which no acting fee need be charged. As no visitors were present at the performance in question, except the performers, the defendant claimed that the performance was not "in public."

Performing right, to use a name commonly given to that aspect of the copyright in a dramatic work, was in this country the creation of the statute 3 & 4 Will. IV, c. 15, s. 1, which gave to the author "the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment whatsoever in the British Dominions." This section did not contain any limitation to public performances. In *Duck* v. *Bates* (1), FRY, L.J., in dissenting from the majority of the Court of Appeal, based his judgment on the view that no such limitation could be imported. BRETT, M.R., and BOWEN, L.J., accepted the view that what was meant was performance in public. This had already been held by WILDE, C.J., in *Lee* v. *Simpson* (2). The Act of 1911, while leaving out the words "place of dramatic entertainment" expressly defined the author's right as the sole right of performing in public.

In considering the question now before the court, it is natural to repeat the words of BOWEN, L.J., in *Duck* v. *Bates* (1) at page 849 :

> We have to construe a statute which it is not easy to interpret ; the subject-matter is difficult, and the words used are vague.

The Act of 1911 gives no definition of the words "in public." These words are also used in sect. 2, subsect. 3, and in sect. 4, but neither of these latter sections seems to give any help in this connection. It has been said more than once that it is a question of fact whether any particular performance is in public or not. But that expression is not in a strict sense correct. BOWEN, L.J., at page 850, thus qualifies it :

It is "to a certain extent a question of fact." The question, in my opinion, must involve both law and fact, law in the sense that the true meaning of the words "in public" must be ascertained as matter of law, and fact in the sense that it must be determined whether the facts of the case do or do not fall within that meaning. Opinions may differ whether the conclusion is properly described as one of law or one of mixed fact and law. Such authorities as there are do not seem very precise in defining the meaning of the words "in public"; it is certainly difficult and perhaps impossible to define the precise borders of the territory which they cover. "The public" is a term of uncertain import; it must be limited in every case by the context in which it is used. It does not generally mean the inhabitants of the world or even the inhabitants of this country. In any specific context it may mean for practical purposes only the inhabitants of a village or such members of the community as particular advertisements would reach, or who would be interested in any particular matter, professional, political, social, artistic, or local. In the case of a dramatic work the public may be regarded as including persons to whom the drama appeals, but that again must be limited by local and other conditions. Thus it is clear that by "public" is meant, in the words of Bowen, L.J., "a portion of the public." The particular portion of the public which is meant may sometimes be very small indeed. In *Duck* v. *Bates* (1) the number of persons present at the dramatic performance was about 170. In *Harms Incorporated and Chappell & Co.* v. *Martan's Club* (3), the number present was about 200. In *Performing Right Society* v. *Hawthorn Hotel (Bournemouth) Ltd.* (4), the number present is not stated, but it was, it seems, much less than either of these numbers. In the first of these cases, the performance was held not to be in public; in the two last it was held to be in public. Thus mere numbers cannot be the test. In *Duck* v. *Bates* (1) the distinction was expressed to be between a public and a domestic or *quasi*-domestic performance, and Brett M.R., at page 848, defines a public representation as a representation to which any portion of the public are freely admitted either with or without payment. In that case the dramatic representation was given to nurses and attendants of a hospital, together with the medical men and the students and the families of some of the medical men. The performance was gratuitous. The majority of the Court of Appeal (Brett, M.R., and Bowen, L.J.) were obviously glad for reasons of sympathy to come to the decision that it was a domestic (or *quasi*-domestic) and not a public performance, presumably because the audience was in the main composed of the nurses who lived together at the hospital, but they clearly regarded it as a border line case. Bowen, L.J., at page 850, emphasised the distinction between that case and "a performance to which the public at large or any portion of the public are invited"; he added that the

question must be largely a question of fact. Earlier in the judgment he said: "Some domestic or *quasi*-domestic entertainments may not come within the Act"; then he adds: "Suppose a club of persons united for the purposes of good fellowship gives a dramatic entertainment to its members; I do not say that the entertainment will necessarily fall within the prohibition of the statute." He seems to imply that such an entertainment would not generally be domestic or *quasi*-domestic.

This rather cryptical and non-committal expression was considered in *Harms'* case (3) where the performance was at the Embassy Club, a proprietary club in London. Members of the club and some guests were present; the members were subscribers, an object of the club being the provision of dance music, which was an amenity included in the subscription; any suitable person was invited to become a member of the club. It was held in that case that the plaintiffs' copyright was infringed. SARGANT, L.J., at p. 537, said:

> there has been an invitation to the members of the public capable of becoming members of the club upon the terms of getting in return for their subscription the performance of music, so that you do really get an invitation to the public, and an invitation to the public to listen at a price or at a payment, though the payment is an annual one. Beyond that, there is, of course, this, that the members of the public who have become members of the club by passing through the not very severe test which is imposed, have also the privilege of bringing in other members of the public upon whom no test is imposed, who happen to be their friends and are invited on any particular evening.

The Court of Appeal held the entertainment was not domestic or *quasi*-domestic. They distinguished *Duck* v. *Bates* (1) as being a case where the audience was limited to nurses and others either living in the hospital or connected with its management and a few friends There was thus, the court said, something of the nature of an enlarged family or domestic performance. In the *Performing Right* case (4), BENNETT, J., held that the performance by the hotel orchestra after dinner was public, because it was open to any members of the public who cared to be guests of the hotel, either by sleeping or dining there.

Thus the broad distinction between *Duck* v. *Bates* (1) and the two later cases seems to be that in the former the audience was limited to a class more or less living under one roof (with some additions deemed immaterial), whereas in the two latter the audience consisted of any members of the public who had accepted the invitation to attend either by becoming members of the club or guests of the hotel. The invitation to attend in either case was held to be to the public, or, rather, to a portion of the public, though the public or portion of the public concerned was definitely limited, in the former case to the maximum possible membership of the club and to an actual possible audience based on the size

of the club-room, and in the latter case by the sleeping accommodation of the hotel and the size of the hotel lounge.

In *Duck* v. *Bates* (1) the presence of visitors was not held to render the defendant liable for infringement. If numbers are to be considered, there is no great difference in the size of the audience in that case and in *Harms'* case (3). In none of the three cases was there profit in the sense of a direct charge for admission (except for guests), though in the two later cases there was indirect profit, because the company which ran the club had the benefit of the members' subscriptions, and the hotel had the benefit of the custom of the audience.

The presence or absence of visitors is thus not the decisive factor, nor does it matter whether the performance is paid or gratuitous, nor is it conclusive that admission is free or for payment, nor is the number of the audience decisive. It may be observed that in this country actions or other cases are in general tried in public, and the court is public, though the number of the public present at any hearing may not be more than half a dozen. Again, an unsuccessful dramatic performance, though freely advertised to the relevant public, may not attract an audience of more than ten or twenty, but is still a public performance. The antithesis adopted by the cases between performances in public and performances domestic or *quasi*-domestic cannot be said necessarily to depend on these factors either separately or in combination. The true criterion seems to be the character of the audience. If the performance of " The Rest Cure " in the Duston Village Institute had been before an audience of exactly the same women as constituted it in fact, drawn from the village, but they had been brought together by a general invitation or advertisement, all other conditions being the same, it cannot be doubted that it would have been a performance in public. In the actual facts, the audience was limited to members of the Institute in the village, but all the adult women in the village could be members, and were invited to be members. Election if desired was, in the absence of special disability, a matter of course. If payment was to be considered, the annual 2*s.* subscription included such performances, and thus corresponded to a small payment for the performance. There was no other qualification for membership except residence in the village, but mere residence in the same village in different homes cannot be regarded as constituting a domestic or *quasi*-domestic audience. There was nothing like the fact of the hospital as the common home which gave a *quasi*-domestic complexion to the performance in *Duck* v. *Bates* (1). Thus it would certainly be a great extension of *Duck* v. *Bates* (1) to apply the decision there to this case; and, as already stated, that case was, in the opinion of Brett, M.R., a borderline and extreme case. The words of Bowen, L.J., quoted above with reference to a club of persons united for the purposes of good fellowship seem to indicate that a dramatic

performance given to its members would generally fall within the prohibition of the statute. Furthermore, the Institute is a society of a *quasi*-public character. I treat the Duston Institute for this purpose as a separate body, and in my opinion the character of the performance in question cannot be determined by considering that the Institute is in one sense a branch of the National Federation. But that aspect is useful to remember as a warning to the court that if the performance in question is held not to be a performance in public, the rights of owners of dramatic copyright in music or copyright in lectures all over the country will be seriously prejudiced; their plays will be liable to lose novelty, and the public demand for performance will be affected; the public appetite will be exhausted. The same is true of musical compositions and of lectures. It is the duty of the court to protect the rights of authors, composers and lecturers, according to a fair construction of the statute. The court cannot be influenced by feelings of sympathy for the Women's Institute movement, and must decide the case as if it related to an ordinary village social club open to all village women who chose to take the necessary steps to join, which gave to its members a dramatic entertainment by means of performers from outside, whether amateur or professional. Probably no one would question that the performance was in public if the audience, other circumstances being the same, had been, not 62, but 600, as I suppose in one of the larger villages it might have been. If that were not a performance in public, and might be repeated indefinitely all over the country, the performing right would not be of much value. The quality of domesticity or *quasi*-domesticity seems to me to be absent. I think such performances are in public within the meaning of the statute.

The case seems to me to be within the principle laid down in *Harms'* case (3) rather than within the principle applied in *Duck* v. *Bates* (1). With great respect to the learned Judge, I have come to the conclusion that the performance in question of "The Rest Cure" was a performance in public.

I think the appeal should be allowed, with costs here and below.

ROMER, L.J.: The question to be decided upon this appeal is whether a performance of a play called "The Rest Cure" at the monthly meeting of the Duston Women's Institute on Feb. 23, 1933, was a performance in public within the meaning of the Copyright Act, 1911, s. 1 (2).

The Act contains no definition of the words "in public," and in this connection they are probably incapable of precise definition. It can safely be asserted that they mean "not in private," but this does not carry the matter much further without some definition of the words "in private." There are, however, many cases in which there can be no doubt at all whether a particular performance is in public or in private.

No one, for instance, can doubt that the concerts given at the Albert Hall are, in general, performances "in public," or that music provided by a man for the entertainment of his guests after dinner or at a reception is performed "in private"; and I think that the meaning of the two phrases can best be ascertained by considering what is the essential difference between the two performances. The difference material for the present purpose lies, as it seems to me, in this. In the latter case the entertainment forms part of the domestic or home life of the person who provides it, and none the less because of the presence of his guests. They are for the time being members of his home circle. In the former case, however, the entertainment is in no sense part of the domestic or home life of the members of the audience. It forms part of what may be called in contradistinction their non-domestic or outside life. In the one case the audience are present in their capacity as members of the particular home circle. In the other they are present in their capacity as members of the music-loving section of the public. The home circle may, of course, in some cases be a large one. The section of the public forming the audience may in some cases be a small one. But this can make no difference, though it may sometimes be difficult to decide whether a particular collection of persons can properly be regarded as constituting a domestic circle. In *Duck* v. *Bates* (1) the Court of Appeal seem to have regarded the nurses and medical staff of Guy's Hospital as forming a domestic circle, and a dramatic entertainment given before them and their guests as a private performance. BENNETT, J., on the other hand, in *Performing Right Society* v. *Hawthorn Hotel* (4), treated, and in my opinion rightly treated, a musical entertainment given to the residents in an hotel, to which any respectable member of the public could obtain admission merely by payment, as a performance in public. Nor, with all deference to those who think otherwise, can I agree that it makes any difference whether the actual performers are paid for their services or give them gratuitously, or whether the performers are strangers or members of the domestic circle. The performers at what is unquestionably a private performance are frequently paid. The performers at what is unquestionably a public performance frequently give their services for nothing. Nor can an entertainment that is private when given by the members of the home circle cease to be private when given by strangers.

I also find some difficulty in seeing why it is material to consider the nature of and the place where the entertainment is given. A private entertainment may be given in a public room. A public entertainment may be given in a private house. The question whether an entertainment is given in public or in private depends, in my opinion, solely upon the character of the audience. Suppose, for instance, that a number of people who are interested in the drama band themselves together in a society

or club for the purpose of providing by means of their subscriptions the performance before themselves from time to time of dramatic works. This would be something entirely outside their domestic lives, and they would, in my opinion, attend the performances merely as members of the public, and none the less because the section of the public which they represent may be limited by election, the social status of the members, or their capacity to pay a large subscription. I should regard any dramatic performance given before that society as a performance in public.

So, too, in the case of *Harms Incorporated and Chappell & Co.* v. *Martan's Club* (3), which related to a musical performance in the Embassy Club. Its members were merely members of the public who paid an annual subscription for the purpose (among other things) of having dance music played to them. A performance of music given before them and their guests was accordingly held to be a performance in public. By no stretch of imagination could the audience in that case be regarded as forming a domestic circle. The teaching staff and pupils of a boarding school might, on the other hand, properly be regarded during the school term as forming a domestic circle, and a musical or dramatic performance given before them might well be held to be a private performance, even though the parents or other relations of the pupils were present as guests. I cannot, indeed, think that a performance which would otherwise have been a performance in private could be turned into a performance in public by the mere presence of some guests. Guests were present at the entertainment that was the subject matter of the inquiry in *Duck* v. *Bates* (1), to which I have already referred—a case which it must be confessed was somewhat near the line. It is easy to imagine other cases in which it is difficult to say whether they fall on the private or public side of the line. But the present case seems to me quite plainly to fall upon the public side. It is, in my opinion, impossible to regard the audience at the meeting of the Duston Women's Institute on Feb. 23, 1933, as constituting a domestic circle. The women that formed that audience were merely members of the public who were paying 2*s.* a year for, among other things, the privilege of being entertained at intervals of a month or more by a lecture or a dramatic performance, or in some other way. The section of the public from which they were drawn was no doubt a comparatively small one, consisting, as it did, of the women residing in the parish of Duston. But this can make no difference. Nor can it make any difference that except in the case of the original members each member had to be elected. As a matter of fact, it is plain that any respectable woman residing in Duston who desired to join the Institute would have been elected as a matter of course. There is no instance on record of one being rejected. The members were in no way bound to one another by any domestic or *quasi*-domestic tie. The monthly

meeting formed part not of the domestic, that is of the private life of a member, but of her outside, that is to say, of her public life. In all respects that, in my opinion, is material to be considered—her case in no way differs in principle from that of a member of the Embassy Club. The annual subscription to the Institute is no doubt a very small one, and there are at present only 109 members. But the question that we have to decide is one of principle and one of great importance to lecturers, authors, and composers. For there are about 5,000 similar institutes in England and Wales with a total membership of something like 300,000. If performances given before these institutes are private performances, the result to the owner of the copyright in the works performed would be serious.

In my judgment, however, such performances are performances in public, and this appeal should be allowed.

Greene, L.J. [read by Romer, L.J.]: Upon the view which I take of this case the circumstance that the performance was given by members of a different institute from that to which the audience belonged is immaterial. In my opinion, the performance would equally have been an infringement of the plaintiff's copyright if it had been given by members of the Duston Women's Institute. My reasons for attaching no importance to this distinction will sufficiently appear later in this judgment.

The question whether or not a performance is "in public" has been referred to as being "to a certain extent" or "largely" a question of fact or even as "a question of fact" *simpliciter*. I interpret these phrases as meaning that the question whether or not a particular performance is a performance "in public" must depend upon the particular facts of each case. Once the facts are ascertained the question on which side of the line the case falls must, in the case of an undefined expression, such as "in public," fall to be decided by the light of the court's own sense of language with such assistance as may be obtained from the whole context of the Act. In other words, the meaning of the phrase "in public" is a question of law, and the question whether the facts when ascertained fall within the words is also a question of law (see, for instance, *Farmer* v. *Cotton's Trustees* (5), at page 932, per Lord Parker).

It is, I think, important, in approaching the question whether a particular performance is "in public," to bear in mind that by the Copyright Act, 1911, s. 2 (1), infringement is defined by reference to the things, the sole right to do which is by the Act conferred on the owner of the copyright. The owner of the copyright is by sect. 1 (2) given the sole right to perform the work in public, and any person who does this without the consent of the owner infringes his copyright. The question may therefore be usefully approached by inquiring whether or not the act complained of as an infringement would, if done by the owner of the

copyright himself, have been an exercise by him of the statutory right conferred upon him. In other words, the expression "in public" must be considered in relation to the owner of the copyright. If the audience considered in relation to the owner of the copyright may properly be described as the owner's "public" or part of his "public," then in performing the work before that audience he would, in my opinion, be exercising the statutory right conferred upon him; and anyone who without his consent performed the work before that audience would be infringing his copyright.

In the case of dramatic works it is, I think, particularly important to bear in mind the position of the owner of the copyright in relation to the audience. In the performance of a play by amateur actors not only do the actors themselves contribute something to the written word, namely, their own skill in acting and interpretation, but they also derive pleasure and improvement from acting, while the members of the audience derive pleasure from seeing a play acted by their friends. These factors lend a colour of domesticity to an amateur performance given by members of a society or club to fellow-members and tend to divert the mind from the more essential issues. If the performance is such that, if given by or on the authorisation of the owner of the copyright, it would have been a performance before an audience which, in relation to the owner and in respect of that performance, formed part of his "public," the fact that the performers perform for their own pleasure and improvement and the pleasure of their friends appears to me irrelevant.

On the other hand, where a performance is given by children in their parents' drawing-room or by some members of a country-house party to their hosts and fellow-guests, it could not be said that the audience is, in respect of that performance, part of the author's "public."

If the case be taken of a lecture in which the distracting features to which I have referred are not present, the point will more clearly appear. If a lecturer makes his living by composing and delivering lectures to an audience wherever he can find one, delivery by him of such a lecture to the members of a Women's Institute (its constitution and objects being what they are) would, in my opinion, be a delivery of the lecture in public. One of the objects of a Women's Institute is to obtain for its members entertainment and education by means of (among other things) lectures; and persons who desire to obtain entertainment and education by means of lectures form the lecturer's "public." The opportunity of hearing lectures is one of the advantages which the members of the Institute enjoy and to obtain which they pay their subscriptions. Now, if a member of a Women's Institute obtained possession of a copy of the lecturer's manuscript and without his consent delivered the lecture to her fellow-members, I do not see how it could possibly be said that such a delivery would not be a delivery in public.

It would be a delivery to a body of persons desirous of hearing the lecture, who have paid subscriptions with the object, among others, of obtaining that advantage. In the present case the plaintiff makes a living by writing plays and authorising their performance to audiences desirous of seeing the plays performed. The performers, who happened to be members of a Women's Institute, obtained a copy of a play written by the plaintiff, who has the sole right of authorising its performance in public. Those performers performed the play before an audience consisting of members of an association formed for the purpose (among others) of obtaining entertainment and instruction by (among other things) watching the performance of plays. The audience comprises persons of all classes and varying means. It cannot, I think, be doubted that if the plaintiff had herself authorised a performance by actors not connected with a Women's Institute before that audience she would have been exercising her statutory right of authorising the performance of her play in public. If this view be correct, the circumstances that the performers are themselves members of the same or a different Women's Institute, and by that fact and by their individual skill add something to the entertainment of the audience and also by acting improve their own minds, appear to me to be quite irrelevant. Once it is appreciated that the wrong of infringement is defined by reference to the statutory right of the owner of the copyright, and that accordingly the question of what the words "in public" means is to be examined primarily in the light of the relationship of the audience to the owner of the copyright, and not in the light of the relationship of the audience to the performers, the difficulties in the present case appear to me to be removed. I must not be understood as meaning that the relationship of the performers to the audience is in all cases an irrelevant consideration. It may very well be that in some cases the nature of that relationship is important in deciding the question whether the performance, if authorised by the owner of the copyright, would have been a performance "in public." Thus, in the examples which I have given of performances by children or by members of a house party, it would not be possible to say that if the owner of the copyright had authorised performances by those performers before those audiences he would have been exercising his statutory right of authorising performances "in public," notwithstanding that the members of the audiences consisted of what may be described as members of the play-going public. Viewed in relation to those performances by those performers the audiences would not be members of the play-going public, but mere gatherings of relations or friends. In the present case the circumstances are quite different, and having regard to the nature of the audience and the objects for which they were present, the particular relationship of the performers to the audience as being members of the same or a different Women's Institute and as giving the perform-

ance in part for their own pleasure and improvement, appears to me to be of no importance.

I agree that the appeal should be allowed, with costs.

Solicitors: *Reynolds, Sons & Gorst* (for the appellant); *Francis & Crookenden* (for the respondent).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

G. W. FISHER LIMITED *v.* EASTWOODS LIMITED.

[KING'S BENCH DIVISION (Branson, J.), **March 3, 4, 1936.**]

Contract—Non-performance within a reasonable time—Act inconsistent with continuance of contract.

In 1929 defendants contracted to deliver to the plaintiff 25,000 tons of cement to be delivered as and when required at 28*s.* per ton. The plaintiff at that time anticipated the completion of a contract which would enable him to dispose of this cement, but the contract never materialised. The contract was then allowed to sleep till 1931 when, after correspondence, the contract was revived or a new contract entered into upon the old terms as to about 24,000 tons of cement. Some deliveries were made, but in 1933 there was such a slump in the trade that it was not profitable for the plaintiff to take the cement at 28*s.* He did by arrangement take several deliveries at a lower figure. In 1935 plaintiff, upon prices improving, again attempted to revive the contract. The defendants at no time gave the plaintiff notice to take delivery or determine the contract:—

HELD: (i) the acceptance of deliveries at a figure below the contract price in 1933 was an election on the part of the plaintiff to treat the contract as at an end.

(ii) the contract had been abandoned.

[**EDITORIAL NOTE.** The question of abandonment by non-performance over a long period is a matter very much dependent on the nature of the contract and the circumstances in which it is proposed to be carried out. The present case, therefore, is of more interest from the point of view of the election to treat the contract as at an end by acts which are held to be inconsistent with its continuance. In the former aspect of the case the performance of the contract must be within a reasonable time, and it is always a difficult question to determine what is a reasonable time. In the latter aspect, one is not troubled to solve questions of this nature, but to find some act clearly outside the scope of the contract and inconsistent with the view that the parties still treat it as binding.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 7, p. 186, para. 263, and FOR THE CASES, see DIGEST, Vol. 12, pp. 350, 351, Nos. 2907-2913.]

Cases referred to:

(1) *Jones* v. *Gibbons* (1853), 8 Exch. 920; 12 Digest 307, *2533.*

(2) *Pearl Mill Co.* v. *Ivy Tannery Co.*, [1919] 1 K.B. 78; 12 Digest 351, *2911.*

ACTION for (*a*) a declaration that the defendants are under a contractual obligation to the plaintiff to make delivery of 23,951 tons of

cement to or to the orders of the plaintiff f.o.r. to defendants' works as and when required by the plaintiff at a price of 28*s*. per ton; (*b*) order for specific performance of the balance of a contract between the plaintiff and defendants for sale and delivery by the defendants to the plaintiff of cement as required by the plaintiff at the price of 28*s*. per ton f.o.r. sellers' works. In the alternative (*c*) damages for breach of contract. The defendants alleged that it was an implied term of the contract made between the plaintiff and the defendants dated July 4, 1929, that the cement should be called for by, and delivered to, the plaintiff within a reasonable time, namely, two years. Alternatively the contract was determined by the failure of the plaintiff to call for any further deliveries within a reasonable time after July 27, 1929, and further that the contract was mutually abandoned.

Le Quesne, K.C., and *R. A. Willes*, for the plaintiff. We rely upon *Jones* v. *Gibbons* (1), *Pearl Mills Co.* v. *Ivy Tannery Co.* (2), and Benjamin on Sale, 7th Edn., at pp. 715, 716, where it is stated:

> Where the time for the buyer's request is undefined, the general rule is that the seller is not discharged by mere fact that the buyer has not made any request within a reasonable time after the contract. The seller must at the expiration of a reasonable time give the buyer notice to make his requirement, and is discharged if, on a reasonable time thereafter, the buyer does not make it. What is a reasonable time may be shown by trade usage.

John Morris, K.C. and *Francis S. Laskey* for the defendants: It was an implied term of the contract that the cement should be called for by and delivered to plaintiff within a reasonable time. A reasonable time for such a contract is two years. The contract was mutually abandoned.

Branson, J.: This case arises in the following way. The plaintiff —I call him the plaintiff, as his counsel did, because, though in name he carries on business as G. W. Fisher Limited, in fact he is the person who has all the powers, and all the duties of the company—is a cement merchant. The defendants are cement manufacturers, and the plaintiff contends that the defendants are bound by a contract entered into, between the parties in November, 1931, to deliver to him some 23,000, nearly 24,000 tons of cement. The defendants' case is that there was such a contract in November, 1931, but that they are no longer bound by it. They say that they are no longer bound, first, because the contract was abandoned in the early part of 1933 by the mutual consent of the parties, and, secondly, they say, putting the matter in a slightly different form, that a reasonable time had expired, and that in the circumstances the contract had been determined by effluxion of time. I will come back to say what I have to say about the law when I have stated what I find to be the facts. So far as material, they lie in quite a small compass.

In the year 1929, upon a representation made by the plaintiff, Mr. Fisher, to the defendants, that he had got a contract for the sale by him of 25,000 tons of cement for certain works which were being carried on by Parkinsons at Birmingham, the contract was entered into under which the plaintiff undertook to buy from the defendants, and the defendants undertook to sell to the plaintiff, 25,000 tons of cement to be used for the purposes of this Birmingham contract. It was not true that Mr. Fisher had a contract with Parkinsons and so, beyond 40 tons of cement which were sent to Birmingham on his order in respect of this 25,000-ton contract, no part of it was ever delivered. The contract providing that the cement should be delivered for use in Birmingham, and Mr. Fisher having failed to get the Parkinson contract, Mr. Fisher was unable to find any outlet for this 25,000 tons of cement. So, except for the 40 tons which had been delivered, the 1929 contract went to sleep, and it slept until Ausust, 1931, when it started to stir in its sleep, and in August, 1931, Mr. Fisher, acting upon the hypothesis that the contract was still effective, writes to the defendants asking them to put 20 tons of cement on rail at Foxton Station. To that the defendants replied on Aug. 28: "We may say this has not been forwarded at the moment as we cannot trace any contract with you, and think there must be some misunderstanding." Upon those letters discussions arose as to what was to be done in respect of this old 1929 contract, and I think it is plain that when the matter was raised the attitude of the parties was this. The defendant said: "You have undertaken to buy 25,000 tons of cement to be delivered in the Lancashire district," and the plaintiff was saying: "Well, I cannot do it, but I can deal with the 25,000 tons if you will free me from the local limit." Discussions then arose, and it was agreed in November, 1931, that instead of being obliged to deliver in the Lancashire district for the Lancashire roads, the plaintiff should have the opportunity of taking cement at 28*s.* per ton for delivery anywhere he liked to choose except certain counties in the neighbourhood of the defendants' works. The particular ones are immaterial. So the parties then began to act upon the amended contract, and during the year 1932 the plaintiff took about 1,000 tons, I think it was 1,009 tons altogether, under the contract, whether you call it the contract of 1929 or the contract of 1931, or the contract of 1929 as amended in 1931. At the end of 1932 the cement market began to get into heavy weather. There was some kind of makers' ring which was attempting to keep up prices, but the ring functioned badly and prices were not kept up, and in 1933 the position in the market was that it was quite impossible for the plaintiff to take the cement which he had contracted to buy at 28*s.* f.o.r. from the defendants and deal with it at a profit. The plaintiff himself put it in this way, that after February, 1933, he did no business *ex* the contract. It was put to him: "And was that for the reason that you

could not? (*A*) It was agreed between both of us that we could not." I stop in the middle of an answer because the rest of what he said is argument and I shall come back to it in a moment. But then from April, 1933, to the end of May, 1934, what I find is this. Nothing further was done under the existing contract at 28*s*., but the plaintiff was continually asking the defendants to give him quotations for the delivery of various quantities of cement on site at different places where he thought he could get contracts. They quoted over and over again, and in a certain modicum of the instances in which the plaintiff tried to get a contract he succeeded, and when he succeeded in getting a contract for the sale of cement the defendants delivered the cement at prices always well under the price of 28*s*. The parties have very wisely admitted a great many facts in this case, and it is admitted that in respect of the contracts for the cement which was taken by the plaintiff from the defendants from April, 1933, to the end of May, 1934, the f.o.r. price ranged from 20*s*. 9½*d*. as a minimum to 23*s*. 8½*d*. as a maximum. Under those contracts some, speaking in quite rough figures, 3,000 odd tons of cement were bought by the plaintiff from the defendants and delivered by the defendants to the plaintiff. After the end of May, 1934, again matters went to sleep except for quotations being asked for and given all in vain, because no business resulted; and in January, 1935, again the plaintiff returns to the question of this contract. It is material to notice that during the years 1933 and 1934 the manufacturers' ring, if I may use a compendious terms, had been functioning very badly. The merchants and manufacturers had been cutting prices, and prices had fallen very considerably, but at the end of 1934 the federation was re-formed, and in December, 1934, a new attempt at the standardisation of prices was made. The result was that prices immediately went up, and that new system having come into force upon Dec. 11, 1934, one finds that in January, 1935, the plaintiff starts an inquiry which, if answered, would enable him to see whether he could get a contract upon the basis of a 28*s*. rate f.o.r. at the defendants' works. So he writes asking for the present day rail rate to Tamworth, and the answer which is made by the defendants is to say: "we are not quite sure why you should require the rail and road rates to Tamworth as under the Cement Manufacturers' Federation we are only allowed to send cement carriage paid to this station or deliver to site." However, for his information they give him a rate. Then he asks for another rate, and for another rate, and ultimately on Feb. 22, 1935, he writes to say: "It would appear to me to be quite evident from your letters that you have entirely overlooked the existence of a contract between us made with your Mr. Boot and confirmed in our letter to you of Nov. 23, 1931. We have still a considerable quantity of cement to take *ex* this contract and we must ask you to be good enough to give us the delivery information

which we have repeatedly asked you for so that we may make the necessary arrangements to draw supplies from your Foxton Works." On Feb. 26 the defendants' answer: "There is no such contract in existence such as that to which you refer. All outstanding arrangements in connection with that matter were abandoned by mutual consent some years ago." There is further argument in the letters, but those two letters bring the parties to the point, one saying: "I have still got a contract in existence," and the other that the contract was abandoned by mutual consent some years ago.

I now turn for a moment's consideration to the law which is applicable in a case of this kind. Mr. Le Quesne for the plaintiff relies very strongly upon the decision of the Court of Exchequer in *Jones* v. *Gibbons* (1). That was a case upon demurrer, and it decides, as I understand it, no more than this, that where parties have entered into a contract under which a seller sells to a purchaser a quantity of goods to be delivered to the plaintiff as required, mere effluxion of time does not provide a defence to the seller if he is sued by the buyer for non-delivery of the goods. POLLOCK, C.B., in the course of the argument said at p. 922:

> The defendant reads the contract as if the condition which the law implies were part of it;

that is the condition that it shall be performed within a reasonable time. He goes on:

> No doubt, where a contract is silent as to time, the law implies that it is to be performed within a reasonable time; but there is another maxim of law, viz., that every reasonable condition is also implied; and it seems to be reasonable that the party who seeks to put an end to the contract, because the other party has not, within a reasonable time, required him to deliver the goods, should in the first instance inquire of the latter whether he means to have them.

If one takes what the Chief Baron says literally all that is necessary in order that the seller should be relieved of his contract after the expiration of a reasonable time is that he shall have inquired of the buyer whether he means to have the goods or not. The case was dealt with in the later case of the *Pearl Mill Company* v. *Ivy Tannery Company Limited* (2). There ROWLATT and MCCARDIE, JJ., after pointing out that *Jones* v. *Gibbons* (1) was decided upon demurrer and so was simply an authority for a very concise and clean cut proposition of law, go on to say that that decision does not mean that, where there are other maxims of law under which a contract which has no limit as to time may be brought to an end, they will not have effect, and they held in that case that where not only a reasonable time, but a very considerable time had elapsed, that provided sufficient grounds to support the finding of the County Court Judge that the parties had mutually abandoned the contract.

I think the real question I have to decide here is not the purely legal question as to whether this contract was allowed to lapse by the effluxion

of a reasonable time, but the practical question as to whether the parties have or have not abandoned the contract and treated it as at an end so as to disentitle the plaintiff from saying in the beginning of 1935 : " I still have with you a valid and binding contract which you have got to perform." That is a question which depends not only upon the time during which a contract is allowed to lie unused and unreferred to, but also upon such other acts of the parties, done while that time was elapsing, which may bear upon the question whether they in their own minds did not come to the conclusion that this contract was to be treated as no longer operative between them. All kinds of considerations of fact may arise in the decision of a question of that sort, the relationship between the parties, their conduct in respect of other contracts which have been entered into between them and the whole history of their mutual dealings and, approaching this case from that point of view, what I find in the present instance is this. Going back to the contract of 1929, it was entered into and bound the plaintiff to take a certain quantity, to wit, the 25,000 tons of cement, and he himself agrees that it bound him to do so within a period of four years, which was the period of the contract for which the cement was being ordered. He loses that contract which he said he had—perhaps he thought he had—and what is the position ? There was a binding and valid contract between these parties under which the plaintiff was bound to take at 28*s.* a ton this 25,000 tons of cement to be delivered to purchasers in Lancashire. He goes to the defendants and he says : " I cannot do that ; I have lost the contract which I thought was going to enable me to do it." What do they do ? They do not say : " You take the things or pay us damages." What they say is : " We will re-arrange the contract so as to enable you to deal with the matter," and the contract is arranged. Instead of being compelled to take these 25,000 tons or to pay damages under the old contract they alter the conrtact to enable him to deliver the cement anywhere except within these few counties which were named. Then comes the slump in cement. He has taken 1,000 of these 25,000 tons. What they might have said to him was : " If you do not go on taking from this contract, we will sue for damages for breach," and what would his answer have been ? Unless his answer could have been : " Well, a reasonable time has not yet expired," there was none. He had agreed t take it, and to take it at that price, but, as he says, they dealt with the matter in a business way. It was recognised he could not take this amount of cement under the contract without making a loss, so what do they do ? He says that nothing was said. When they came to the conclusion that the contract at 28*s.* could not then be carried out, the question as to what was to happen in the future was not discussed between them ; in fact, learned counsel, who misunderstood what he said, put it to him : " I understood you to say it was agreed that the

deliveries should be taken at a later time," and he said: "I have not said that." Then he said: "It was not discussed," and I put to him: "Simply left over." It simply was not discussed at all, is that it?" said Mr. Morris, and the witness said: "Yes." So one has this position: a man who had already made the contract for the 25,000 tons to be taken and to be distributed in Lancashire, and who had failed in that, and who had had the contract amended so that he could deliver it wherever he liked except in about four or five counties in England, again finds, owing to the trend of the market, that he cannot fulfil his obligations. He goes to his sellers and it is plain he cannot do it. Nothing is said in terms as to whether that contract is then and there put an end to, but what is done is that from that time onwards time and time again, new contracts are made for the purchase and sale of cement by the plaintiff from the defendants at different prices, and all at prices very much lower than the contract price. Mr. Boot said, and I believe him, that if he had had the slightest idea in his mind that the plaintiff was mentally reserving the right to claim delivery of 25,000 tons of cement as and when it suited him to take it at 28*s*., the defendants would never have sold to him cement at lower prices. What they, and what any other business man would have done, would have been to say: "If you want cement you can take it under your contract, but if you tell me that contract is at an end because you cannot carry it out, very well, then let us deal at different prices and on different terms." I think the plain inference from what was done was that both parties treated this contract for the 25,000 tons as at an end and proceeded to deal for their requirements on different terms and at different prices. It seems to me it would have been madness on the part of the defendants to do anything else. If the plaintiff's view is correct, he could keep this contract for 25,000 tons of cement at 28*s*. in his desk, produce it whenever it paid him to do so, and let it lie in his desk whenever it did not pay him to do so, and when it did not pay him to do so go and contract with the defendants at other figures. I think that the fact that these people from the end of Feb., 1933, until after the end of 1934, and after the market had been entirely reorganised by the resuscitation and rehabilitation of the federation said nothing whatever about this contract, shows quite clearly that it was treated as abandoned in the year 1933. I have used the expression "said nothing about this contract." There is a conflict of evidence about that, Mr. Fisher says it was mentioned from time to time between him and Mr. Read. Mr. Read flatly denies it, and I believe Mr. Read. I do not believe Mr. Fisher on this matter, and I am not sure that he was very clear about it, because at one time he said: "Oh, yes, it was mentioned; it was mentioned in a joking way." Business men do not mention a 25,000 tons contract, even of cement, in a joking way, and I accept Mr. Read's evidence upon this

point, as I do wherever it differs from Mr. Fisher's. I think that the resuscitation, or the attempted resuscitation of this contract in the beginning of 1935 was the result of two things: it was the result, first of all, of the fact that the cement market had been improved by the refunctioning of the Federation, and also by the fact that Mr. Fisher found himself for one reason or another, as to which I have no concern, struck out of the list of cement merchants, with the result that unless he could get some claim under some pre-existing contract no cement manufacturer who was a member of the Federation could supply him at merchants' prices, but only at users' prices, and therefore he would be, to all intents and purposes, excluded from carrying on business as a cement merchant. As to the rights and wrongs of that position, I say nothing, because it is not material to the present case.

The result of the matter is that in my view this contract has been abandoned, and as some effort was made by Mr. Le Quesne to try and make Mr. Boot fix the actual date of the abandonment, I think I should say this: that I regard the evidence of abandonment as cumulative. I should not have been prepared, I think, to accept one instance of a quotation of a lower price, or special terms, for a particular contract, as evidencing an intention by itself to abandon a contract of this sort; but I base my judgment upon the fact that, as is shown in one of the exhibits here (P. 5), for months and months one gets a continual succession of quotations asked for and given which are obviously not based upon this contract or upon the period for which it is to exist.

I mention, just in order to show that I have not forgotten it, one document which is relied upon by Mr. Le Quesne. That is a letter in Sept., 1934, in which, after asking for a quotation price for 500 tons delivered to site or station at Scarborough, the plaintiff puts in a post-script asking for a rail rate to Scarborough. I am asked upon that solitary instance of request for a rail rate to assume that neither Mr. Fisher, nor the defendants, thought that this contract had been put an end to. I decline to draw any such inference at all. It may be that Mr. Fisher by the end of Sept., 1934, had begun to wonder whether it was not going to pay him to attempt to pump some life into this defunct contract, but I think long before that, from the business which the parties had been doing, and the business which they had been trying to do and had not succeeded in doing upon a basis quite inconsistent with the 28*s.* contract, and at prices which were very much below it, it is plain that they considered the contract was abandoned.

For these reasons I have come to the conclusion that I should enter judgment for the defendants, and with costs.

Solicitors: *Langhams*, agents for *Philip Baker & Co.*, Birmingham (for the plaintiff); *Macdonald & Stacey* (for the defendants).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

PORT OF LONDON AUTHORITY *v.* OWNERS OF S.S. "CLAN COLQUHOUN."

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **February 25, 1936.**]

Shipping—Contract of towage—Commencement of towage—Contract for more than one tug—Port of London Dock Bye-laws, 1928, *No.* 19.

The Port of London Authority, under a towage contract, supplied two tugs to the defendants' ship "Clan Colquhoun." The tug "Sirdar" made fast ahead and towed, while the "Clan Colquhoun," following the usual practice was, to the knowledge of the dockmaster, going ahead slowly with her main engines. The ship was exhibiting on either side the notice: "Twin screws. Keep clear of the blades." The tug "Beam" came alongside to make fast astern and drifted towards the ship's stern as the crew were taking hold of the heaving line and making fast the tow ropes. When the tug drew dangerously near, the "Clan Colquhoun" stopped her engines, but before the propellors were stationary the tug was struck. The contract provided in clause 1: "the towage . . . shall be deemed to have commenced when the tow rope has been passed to or by the tug"; and clause 4 provided that the owners of the ship being towed should be liable for damage to any of the Port of London Authority's property, including the tug or tugs engaged in such towage:—

HELD: (i) the accident was due to the improper handling of the "Beam," by reason of her master not appreciating that the "Clan Colquhoun" was a twin-screw vessel.

(ii) the navigation of the "Clan Colquhoun" was not negligent.

(iii) previous consent of the dockmaster to use the engines having been given, there was no breach of Port of London Dock Bye-law No. 19, which did not apply to the "Clan Colquhoun" at the time.

(iv) the towage "was to be deemed to have commenced" when the tow rope or ropes had been passed to each of the two tugs.

(v) the towage had not therefore commenced, and clause 4 of the contract did not apply.

[**EDITORIAL NOTE.** This decision is in its nature a decision upon the special form of contract used by the Port of London Authority, but it will apply to the contracts adopted by many similar authorities, which are generally in much the same terms. The main point in the case is at what point towage commences. The particular liabilities under a towage contract do not, of course, come into force until the towage has commenced and, as this case defers that commencement until the last tow rope had been passed to or by any tug engaged in the towage, it is of importance to shipowners, and in all cases where more than one tug is employed, it will considerably curtail their liabilities to dock or harbour authorities.

FOR THE LAW ON CONTRACTS OF TOWAGE, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 357-359, paras. 499-502; and FOR THE CASES, see DIGEST, Vol. 41, pp. 674-681, Nos. 5048-5113; and FOR THE MARITIME CONVENTIONS ACT, 1911, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 18, p. 485.]

Case referred to:

(1) *The Age* (1923), 17 Lloyd L.R. 172.

ACTION for damage by collision. The facts are fully set out in the judgment.

H. G. Willmer for the plaintiffs.

R. F. Hayward, K.C. for the defendants.

Bucknill, J.: In this case the plaintiffs, the Port of London Authority, are the owners of the steam tug "Beam." The defendants and counterclaimants are the owners of the steamship "Clan Colquhoun."

The "Beam" is a twin-screw tug of 91 feet in length, and at the material time was in charge of a man called Porter. The "Clan Colquhoun" is a twin-screw vessel of 450 feet in length and has a cruiser stern. Each propeller has four blades and the extreme tip projects about two feet outside the counter. Each propeller is about 17 feet from the stern. The collision occurred about 8.34 a.m. on May 16, 1935, in Tilbury Main Dock near the New Lock entrance. The weather was fine and clear; there was no wind and no tide. The "Beam," which was under contract to make fast and tow the "Clan Colquhoun," was struck three blows on her port side aft by the revolving starboard propeller of the ship.

The material facts as I find them are as follows: When the "Clan Colquhoun," which was bound in to the main dock from the lock, cleared the lock entrance, the "Beam," which was then lying off the southern side of the new entrance, proceeded to her and fell alongside her starboard side abaft amidships. The ship at this time had the Port of London Authority's tug "Sirdar" fast ahead towing her, and the ship was also using her main engines which were working at slow ahead. The ship was making about two to three knots. The ship was exhibiting the following notice in large lettering on the poop rails on either side: "Notice. Twin screws. Keep clear of the blades." In my judgment Porter ought to have known before he went alongside the ship that she had twin screws. He saw that the ship was using her own engines, but there would not be sufficient swirl of water to indicate clearly that the ship had twin screws. Because he did not realise that the ship had twin screws, he came alongside her in a way which he thought proper if she had been a single-screw ship; but which he would not have done if he had known that she had twin screws. Having come alongside the ship on more or less the same heading as the ship, with his port engine working ahead and his starboard engine stopped, and in a position in which his stern was not more than 30 feet forward of the revolving starboard propeller, he then stopped his port engine and put his starboard engine slow ahead, and one of the tug's crew threw a heaving line on to the ship's deck. There was a very short delay on the part of the ship's crew in taking hold of the heaving line, and then one of her crew picked it up and carried it aft in order to make it fast to the end of the ship's tow rope which was lying all ready for use on the ship's poop. Whilst this was being done, Porter allowed the "Beam" to fall astern towards the ship's stern and to get dangerously near the revolving starboard propeller. The ship was under slight port wheel

and her stern was tending to come towards the tug. As soon as the tug started to draw dangerously near the propeller of the ship the second officer of the ship, who was on watch aft, hailed her to go ahead and keep clear of the propellers, and almost immediately afterwards telegraphed to the bridge to stop the engines, and this was done, but before the starboard propeller was in fact stationary it struck the tug three blows, with three different blades. A second or two before the first blow the tug sounded a series of short blasts to indicate that she was in difficulties.

On these facts each side has blamed the other for the accident. In my view the accident was wholly due to the improper way in which the tug was handled by reason of the ignorance of her master about the position of the propellers of the ship. In consequence the tug was improperly allowed to drop back along the ship's side. I think that the tug could, without any difficulty on her part, have kept clear of the propeller up to a very short time before the accident if her master had been so minded. In my view those in charge of the ship acted as soon as they could be reasonably expected to act under the circumstances. It is true that the pilot of the ship on the bridge and the second officer aft saw that the tug came alongside in a position in which it was necessary for her to be very careful if she was to keep clear of the starboard propeller. But I think that the pilot and the second officer were entitled to expect the "Beam" to take the necessary steps to keep clear of the propeller. The "Beam" is a twin-screw tug with powerful engines, and there would have been no difficulty in keeping the tug clear of the propeller after she had come alongside of the ship if her master had wished to do so, and which he would have done if he had been aware of the position of the propeller. Looking back, no doubt, it seems that it would have been a wise precaution for the pilot of the ship to have stopped the engines as soon as he saw the tug come alongside. This was an act which the pilot said it was unusual for the tug to do, and the pilot said, to quote his own words, that the tug was "too far aft for my liking." But I do not think that he was negligent not to stop the starboard propeller at once. As HILL, J., remarked in *The Age* (1), at page 173, "Tugs which are making fast to a ship necessarily take upon themselves the main burden of keeping clear." I think that, apart from a possible breach of Bye-law 19, the plaintiffs have failed to establish that the navigation of the ship was negligent.

I have now to consider the point made by the plaintiffs as to the alleged breach of Bye-law 19. The existing Port of London Dock Bye-laws were confirmed by the Minister of Transport on Sept. 20, 1928, and Bye-law No. 19 is in the following terms :

> No person shall work, or cause to be worked, the propelling engines of any ship in the dock for any purpose except with the previous consent of the dockmaster, and at such time and place and in such manner as he shall approve. Penalty £5.

Such consent is only given (if at all) on the terms that the person on whose behalf the application for the same is made will be responsible for all damage caused by working such engines and will indemnify and save harmless the Authority and its officers against all claims in respect of such damage.

Bye-law No. 2 gives certain definitions and states that a "'Dock' means any dock of the Authority and any part of a dock, and any basin, lock, cut, or entrance connected therewith, and includes the quays, wharves, walls, jetties, and piers of such dock. 'Dockmaster' means the dockmaster of such premises, 'and shall include his and their duly authorised deputies and assistants,' and 'Ship' means every vessel not propelled by oars which is intended to go to sea, or which is intended to carry passengers, for profit or pleasure."

It was argued on behalf of the Port of London Authority that at the time of the collision the ship was admittedly using her propelling engines and that no consent of the dockmaster had been obtained; that the ship had therefore committed a breach of the bye-laws, and that the damage to the tug was caused by this breach. On this bye-law the following questions arise. Firstly did the bye-law apply to the "Clan Colquhoun" which was navigating in the dock with the permission of the Port of London Authority? Secondly, if the bye-law did apply, had the defendants obtained the previous consent of the dockmaster, to use the propelling engines of the ship? And, thirdly, can it be said that the mere breach of the bye-law affords a cause of action to the plaintiffs to recover the amount of the damage caused by the breach?

So far as the "Clan Colquhoun" is concerned, on this particular morning the course of conduct by the parties had been as follows: The owners of the ship asked the Port of London Authority to supply two tugs to tow the vessel from lock to berth on certain terms. In pursuance of this request two tugs, the "Sirdar" and the "Beam," were detailed for the towage. In accordance with the usual practice the "Sirdar" made fast ahead and towed, and the "Beam" was preparing to make fast astern. The "Beam's" job was to assist the ship to make a right-angled turn under port wheel into her berth in the East Branch Dock. From the entrance lock to the ship's berth is roughly about 1,000 yards. When the ship was in the entrance lock and the inner gates were open, the dockmaster sounded a signal of two short blasts, which is the usual signal for the ship to come ahead on her main engines. The ship's engines were then put ahead with the knowledge of the dockmaster, and the ship steamed out of the lock. After she had been going ahead on her engines for about two minutes the "Sirdar" made fast ahead, and the ship continued to work her engines slow ahead until the collision, which occurred about two minutes after the "Sirdar" made fast. It was proved on behalf of the ship, and not disputed on behalf of the Port of London Authority, that it was the universal practice of ships of the

Clan Line, and indeed of all ships navigating through the dock as this ship was doing on this occasion, to use her main engines to assist in the towage, and that no complaint about such use had ever been made by the Port of London Authority. Porter, the acting master of the "Beam," admitted that there was nothing unusual in the "Clan Colquhoun" using her engines and that it was usually done.

In my view the Bye-law No. 19 did not apply to the "Clan Colquhoun" at the time in question. If Bye-law 19 applied, I think that the ship did not commit a breach of it because the previous consent of the dock-master to use the engines was given. If the "Clan Colquhoun" did commit a breach, then the damage was caused partly by the negligent navigation of the tug and partly by the breach of the bye-law. It is not necessary for me to decide the nice question whether the defendants would be liable to the plaintiffs for damage contributed to by a breach of the bye-law, and whether in such a case as this the Maritime Conventions Act, 1911, s. 1, would apply, and that the liability should be apportioned.

The next point that arises is as to the construction of the towage contract. The Port of London Authority contended that by the terms of the towage contract the owners of the ship agreed to pay for any damage to any of the Port Authority's property (including the tug or tugs engaged in such towage or transport) which may arise from collision —whether such collision was caused or contributed to by the negligence of any officers of the Port Authority. The first point made on behalf of the ship was that the Port of London Authority could not claim the benefit of the protection and indemnity terms in the towage contract because at the time of the accident these terms had not come into operation. The point arises by reason of clause 1 of the towage terms which is as follows:

> For the purpose of these terms and conditions the towage or transport shall be deemed to have commenced when the tow rope has been passed to or by the tug and to have ended when the tow rope has been finally slipped.

It was argued by Mr. Hayward, on behalf of the ship, that admittedly the tow rope had not been passed to the "Beam" at the time of the collision and therefore the towage had not commenced, and that the protection and indemnity terms only apply to a collision occurring in the course of the towage. It was admitted on behalf of the Port of London Authority that this contention would be sound if the towage was to be done by the "Beam" alone, but Mr. Willmer argued that in this case the towage was to be done by two tugs, and that the towage commenced when one of the two tugs, namely, the "Sirdar," had started towing. Clause 1, to which I have referred, says that the towage must be deemed to have commenced when the tow rope has been passed to

the tug. But in this case the contract is for towage by *two* tugs. In such a case does the expression "the tug" mean each of "the two tugs" or does it mean "either of the two tugs"? The terms, taken as a whole, appear to contemplate the engagement of two tugs. The view that the words "the tug" in clause 1 mean "each of the two tugs" in this case is borne out by clause 2. Clause 2 says that during the towage the masters and crews of the tugs shall cease to be under the control of the Port Authority and shall become subject in all things to the orders and control of the master of the ship. But if the towage starts when one of the two tugs makes fast, how can the second tug be under the control of the master of the tow if that tug is at the other end of the dock and is making her way to the ship to be towed?

Again clause 4, which is the protection clause, refers to the owner of the ship so being towed paying for damage to any of the Port of London's property (including the tug or tugs engaged in such towage). Here again I think this clause contemplates that the towage by the two tugs shall have started, namely, that the tow rope has been passed to each of the two tugs. It is to be noticed that the owners of the "Clan Colquhoun" asked the Port of London Authority to supply two tugs to tow the ship on the terms and conditions endorsed hereon. If the owners of the ship consider that two tugs are needed for the task, it seems unreasonable to hold the ship liable for damage done through the negligence of the Port of London Authority's servants when only one tug is fast and towing. On the other hand, if clause 1 of the terms should be read in this case to mean: "The towage or transport shall be deemed to have commenced when the tow rope has been passed to or by either of the two tugs," then the plaintiffs are in this difficulty. At the time of this accident only the "Sirdar" was towing ahead, and the damage to the "Beam" did not occur in connection with the towage by the "Sirdar." In a case of this kind I think the court ought not to interpret the clause in question in such a way as to entitle the Port of London Authority to recover from the ship in respect of damage to the Port of London Authority's property through the negligence of the Port of London Authority's servants, if any other reasonable interpretation can fairly be given to the clause in question. If the Port of London Authority wishes to impose terms on the owner of the tow which entitles the Port of London Authority to recover damage done to their property through the negligence of their own servants, from the owner of the tow, I think that the terms must be perfectly clear as to their meaning.

In my view clause 1 can fairly be interpreted as meaning that the towage shall be deemed to have commenced when the tow rope or ropes have been passed to each of the two tugs asked for by the ship owner. Until this has been accomplished the ordinary provision of the common law applies to the rights and duties of each party. I there-

fore hold that the terms and conditions in this case do not entitle the plaintiffs to recover their damage, and do not protect them from liability for negligence of their servants in charge of the "Beam."

I therefore pronounce judgment for the defendants on the claim and counterclaim, with costs.

Solicitors: *J. D. Ritchie* (for the plaintiffs); *Coward, Chance & Co.* (for the defendants).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

IN THE ESTATE OF LONG, DECEASED.

[PROBATE, DIVORCE, AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.), **March 2, 1936.**]

Wills—Form—Signature on same page as ordinary commencement—Evidence that signature written last—Wills Act Amendment Act, 1852 (*c.* 24).

A testatrix made three holograph wills, of which only two, the first and third, contained any proper disposition of her estate. On the one side of the sheet on which each of these wills was written were the usual opening words of a will, an appointment of an executor, signature and attestation clause. On the other side were pecuniary and specific legacies and a residuary gift. There was evidence that the whole of each will was written before the signatures of the testatrix and witnesses were made:—

HELD: (i) the proper way to read each will was to begin with the specific legacies and end with the signatures and each was a valid will.

(ii) the third will being complete in itself revoked the earlier wills and should be admitted to probate.

[**EDITORIAL NOTE.** The wills in this case, the form of which is best appreciated from the diagram of their contents given below, would no doubt present more serious difficulties if they had been prepared by a professional person. Being wholly prepared and written by the testatrix herself, there is not so great a difficulty as there would otherwise be in holding that they commenced with the gift of pecuniary legacies. Though professional practice and custom has made the words "This is the last will, etc.," or similar words, the commencement of practically every will, there is nothing in the words themselves that necessitates their being placed at the beginning, nor does the fact that they are placed later in the will in any way interfere with or nullify their proper meaning and purport in a will. There being evidence that the whole will was written before the signature, it is, therefore, quite a reasonable assumption that the will started with the pecuniary legacies, however strange that assumption appears at first sight to the professional mind. Difficulties of this kind have arisen before in the case of printed wills; but this seems to be the first case of a holograph will of this character.

AS TO THE POSITION OF THE SIGNATURE ON A WILL, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 549-551, paras. 1088-1091, and FOR THE CASES, see DIGEST, Vol. 44, pp. 251-258, Nos. 783-849, more particularly pp. 256, 257, Nos. 822-839. FOR THE WILLS ACT AMENDMENT ACT, 1852, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 20, pp. 449, 450.]

Cases referred to :

(1) *Royle* v. *Harris*, [1895] P. 163 ; 44 Digest 257, *831.*
(2) *In the Goods of Wotton* (1874), L.R. 3 P. & D. 159 ; 44 Digest 256, *830.*
(3) *In the Goods of Gilbert* (1898), 78 L.T. 762 ; 44 Digest 257, *836.*
(4) *In the Goods of Smith*, [1931] P. 225 ; Digest Supp.

Application made on behalf of the executor named in the will of the deceased, dated Sept. 2, 1935, for a grant of probate of that will to him as executor, or in the alternative for a grant to him of probate of a page of that will containing his appointment and the signatures of the deceased and the attesting witnesses, together with earlier testamentary papers, dated Feb. 27 and Mar. 25, 1935, respectively. The testatrix died on Oct. 24, 1935, without known relation, leaving estate of the approximate value of £1,500.

The first and third wills were in the following form. Each will was written on two sides of a sheet of paper, the clauses above the dotted line being on one side, and those below it on the other :

This is the last Will and testament of
MABEL AMY LONG
53 Beresford Rd. Highbury
made on [date]
[Appointment of executor]

[Usual attestation clause] } [Signatures of two witnesses] [Signature of testatrix]

.....

I give and bequeath to my dear friends the following sums etc.

[List of pecuniary and specific legacies]

The residue to be divided between Lord Mayor Treloar's Cripple Hospital, Alton, Hampshire, and Dr. Barnardo's Home.

The second will, except that it merely appointed an executor, if the person appointed by the first will was unable to act, and bequeathed the person so appointed £10, was in the usual form.

Clifford Mortimer for the applicant : The court should hold that the dispositive parts of the will were written first on one side of the paper and that the signatures of the testatrix and of the attesting witnesses were in fact written afterwards.

F. L. C. Hodson for the Treasury Solicitor : The proper assumption is that the testatrix signed the will before she wrote the dispositive parts.

C. R. R. Romer appeared for certain charities.

SIR BOYD MERRIMAN, P.: This is a motion to propound one or more of three documents as the last will of Mabel Amy Long, of 53, Beresford Road, Highbury. The testatrix died on Oct. 24, 1935. The three documents are dated Feb. 27, Mar. 25 and Sept. 2 respectively, all in 1935. All three documents are holographs. They show plainly, and this is confirmed by the unchallenged evidence in support of the motion, that the testatrix had a very clear idea of what she wished to do and why she wished to do it. No one looking at these documents can have any doubt, nor is it suggested that there is any doubt, that they were intended respectively to express, and do express, the last wishes of the testatrix. The sole question is whether they, or any of them, are so executed as to effect her manifest purpose.

It is undisputed that the will of Mar. 25, 1935, the second in date, is validly executed. But this will merely names a new executor, in case the executor named in the first will is unable to act; and, beyond bequeathing £10 for the service, it contains no testamentary dispositions. Mr. Mortimer was inclined to argue that the reference to the earlier will might cure any defect in the execution of that will by incorporating it in the second will, the due execution of which was not impeached. He recognised, however, that this submission did not touch the real difficulty in this case, which, as will appear, is to decide how much of the earliest will is validly executed. The point is whether the whole of either the earliest or latest document, or only part of such document, can be admitted to probate. The only practical differences between the earliest and the latest will are that by the latest will the executor, substituted by the second will in place of the executor named in the earliest will, who, in fact, had died before the execution of the latest will, receives £20 instead of £10, and that certain of the identical legatees receive £10 instead of £20. The earliest and the latest wills have the following features in common. Both are written on one sheet of paper: in both the whole of one side of the paper is occupied with the specific legacies, beginning in each case with the words, "I give and bequeath to my dear friends the following sums," etc., and ending in each case with the following words, "The residue to be divided between Lord Mayor Treloar's Cripple Hospital, Alton, Hampshire, and Dr. Barnardo's Home." In neither case is there any mark on the paper to indicate that the words last quoted are the concluding words of the will. In both cases part of the other side of the paper contains the words "This is the last will and testament of Mabel Amy Long, 53, Beresford Road, Highbury, made on" the respective dates, followed by the appointment of the executor. In each case after the appointment of the executor a line is drawn across the paper, indicating finality, and in each case this is followed by the attestation clause, with the signature of the testatrix and the signatures and addresses of the two witnesses, who,

in fact, were the witnesses to all three documents. There is one other common feature, on which stress is laid by Mr. Hodson for the Treasury, namely, that the wording of the bequest to the executor reads " to my executor," naming him, " £10 " or " £20," as the case may be, and this may appear to suggest that the appointment of the executor has already preceded the bequests. On the other hand, there are the following distinctions between the two documents. The earliest will is written on the severed half of a law stationer's sheet for probate engrossment: the latest is written on a piece of notepaper. In the earliest will the bequests and the appointment of the executor followed by the signatures both read from top to bottom of the sheet: in the latest the bequests run from top to bottom of the sheet opened lengthways, that is to say, above and below the fold ordinarily found in a sheet of notepaper, while the appointment of the executor and the signatures run from top to bottom of one side of the paper as normally folded. In the case of the latest will there is no space after the attestation for anything else to be written across the whole width of the page. In the case of the earliest will the last fold of the sheet, nearly a quarter of the whole, below the attestation clause, is left vacant. With regard to the earlier will the witness, Rose Norton, in her affidavit says:

> The will was on a piece of paper the size of foolscap and she told us that her will was on one side. She then signed her name on the other side of the paper and showed us where to sign our names as witnesses, etc.

With regard to the later will, the same witness says:

> The said will was written on a sheet of notepaper, which was folded, and I noticed at the time when the testatrix unfolded the paper that the other side of the sheet to which we put our names had been written on. She told us that the document was her will and that her gifts were set out on the other side. She signed the will in our presence and then asked us to sign it as witnesses, etc.

The other witness, who was deaf, was not quite so explicit; but I have no doubt whatever from an inspection of each document separately and, in particular on a comparison of the two documents, that in each case the side containing the bequests was written at the same time, and therefore that the writing which was seen by the witness on the latest will is that which is now before me. The question for decision is whether the whole or either of these documents is executed in accordance with the Wills Act Amendment Act, 1852. It is not disputed that the execution covers the appointment of the executor in each case, but it is suggested that the execution is not in accordance with the statute as regards the bequests, and that an intestacy therefore results. For the executor Mr. Mortimer argues that the execution comes within the words:

> Every will shall, so far only as regards the position of the signature of the testator . . . be deemed to be valid . . . if the signature shall be so placed at or after,

or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and no such will shall be affected . . . by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature . . .

and while invoking the words "the enumeration of the above circumstances shall not restrict the generality of the above enactment," he argues that in neither case are the bequests inoperative by reason of being underneath or following the signature. Now I am quite clear, indeed Mr. Hodson does not argue the contrary, that the bequests are not underneath the signature. Indeed, though in one case there is ample room for several lines of the bequest to follow the signature, they are, as I have already said, in each case on the other side of the paper.

The question whether they follow the signature is more difficult. This case is not exactly covered by any of the cases which have been decided on these words. I can dismiss the case of *Royle* v. *Harris* (1), which seems to me to turn on the fact that the first page of a lithograph form, at the bottom of which was the signature of the testatrix and the attesting witnesses, contained a bequest to "my sisters and friends," and that this imperfect bequest was expanded on the following page. *In the Goods of Wotton* (2), also the case of a lithograph form, differs from the present case, inasmuch as some form of opening words which, it may be presumed, appeared on the first page, were ignored and the disposing part was written on the second and third blank sides, beginning with the words, written by the testatrix, "This is the last will and testament," etc. It resembles this case in that SIR JAMES HANNEN relied on the evidence of witnesses that the whole document was written before the execution by the testatrix. *In the Goods of Gilbert* (3), also a case of a printed form, in which, unlike the case of *Wotton* (2), the first page was filled up with a bequest to a beneficiary, and like that case, with the appointment of an executor, SIR FRANCIS JEUNE, as he then was, held that the second and third pages, containing various bequests, did not follow the signature, upon evidence that their contents had been written before the signatures on the first page. *In the Goods of Smith* (4), which again was a case of a printed form, the front page containing the words "This is the last will" was filled in with the names of executors and directions as to place of burial, but contained no disposition of property and was duly executed. The matter was complicated by the fact that the testatrix herself had marked the page which was duly executed as page 1, and those on which the bequests occurred as pages 2 and 3 respectively. There was evidence that the testatrix had written the words of pages 2 and 3 before she executed the will on page 1.

Bateson, J., on an inspection of the will, appears to have come to the conclusion that she actually wrote pages 2 and 3 before she wrote page 1. He came to the conclusion that the proper way to read the document was by beginning on what was called page 2 and ending with the signatures. He recognised that this would bring the words "This is the last will and testament" into the middle, but he held that there was no magic in these words.

As I have already said, there is evidence which completely satisfies me that the side of the page containing the bequests in each case was written in its present form before the signatures of the testatrix and the witnesses were made. There is some evidence, of which not the least important is the drawing of the final line above the signatures and the absence of any such line after the bequests, from which it may be inferred that the page containing the bequests, in each case, was written before the page containing the execution; but it is impossible to be certain about this. In my opinion this is not essential. Provided that the court is satisfied that the whole document was written before the signatures were made, and that the doubtful part of the document may be fairly read as preceding and leading up to the part containing the signatures, and in no sense as a mere annexe or schedule thereto, I think that it would be transgressing what Sir James Hannen called "the spirit of the Act" to insist, as a criterion of valid execution, upon proof that the several parts of the document were actually written in any particular order.

In this case, as in the case of *Smith* (4) I am satisfied that the proper way to read both the earliest and the latest will is to begin with the words "I give and bequeath" and to end with the signatures. As the will of Sept. 2, 1935, is complete in itself, and therefore revokes the earlier wills, I direct that this will be admitted to probate. I think it was proper that both the Treasury and the charities named should be represented, and they will both have their costs of the motion out of the estate.

Solicitors: *Rawlinson & Son* (for the applicant); *Hyde, Mahon & Pascall* (for certain charities); *The Treasury Solicitor.*

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law.*]

LATTER *v.* COLWILL.

[KING'S BENCH DIVISION (MacKinnon, J.), **March 2, 3, 1936.**]

Agreement for payment by instalments—Whole sum to become due upon default—One instalment the delivery of specified articles—Value to be given to specified articles.

The defendant owed £266 17*s.* 6*d.* to the plaintiff. In consideration of the plaintiff's forbearance to press his claim, the defendant agreed in settlement of the debt to give to the plaintiff two bronzes and to pay to him two instalments of £20 each on specified dates. The agreement provided that upon default in due payment of any instalment "the whole then remaining balance of the original sum above-mentioned shall become due and payable forthwith." The defendant defaulted in payment of the second instalment, and the plaintiff sued him for £218 17*s.* 6*d.*, giving credit for the first instalment and the two bronzes at his (the plaintiff's) valuation thereof:—

HELD: (i) the effect of the agreement was that the debt was to be satisfied by the delivery of the two bronzes and the payment of £40.

(ii) the bronzes having been handed over and £20 paid "the whole then remaining balance" was £20, and that was all the plaintiff was entitled to recover.

(iii) no evidence of the value of the bronzes was admissible.

[**EDITORIAL NOTE.** The form of contract here in question is commonly found in promissory notes and in fact forms the basis of all contracts providing for payments in instalments. The essential feature of such contracts is that upon default in the payment of any one instalment, the whole sum then outstanding is to become due and payable. The peculiarity of the present case is that as one instalment, the defendant was to deliver two bronzes. Having regard to the total debt and the money payments to be made, the value of the bronzes would have to be taken to be £226 17s. 6d. According to the plaintiff in the present case they were, in fact, worth £28. The point was, however, decided against the plaintiff and the bronzes must be taken to be worth £226 17*s.* 6*d.* and no evidence as to their value was admissible.

FOR PAYMENT BY INSTALMENTS, see HALSBURY, Hailsham Edn., Vol. 2, p. 614, para. 839; and FOR CASES see DIGEST, Vol. 6, p. 26, Nos. 156-158.]

Case referred to:
(1) *Hyams* v. *Stuart King*, [1908] 2 K.B. 696; 25 Digest 401, *58*.

ACTION for £218 17*s.* 6*d*, alleged to be the balance due under an agreement dated Nov. 3, 1935.

The facts and the agreement are set out in the judgment.

H. H. Hanworth for the plaintiff: Upon the true construction of the agreement of Nov. 3, 1935, it is clear that if the defendant defaulted, then the defendant would be liable for the original sum, namely, £266 17*s.* 6*d.* He relied upon *Hyams* v. *Stuart King* (1).

John Senter for the defendant: There is no case to answer. The liability of the defendant was only to deliver the bronzes and pay the stated sums, and the only default is the failure to pay one of those sums.

MacKinnon, J.: In this case the plaintiff is a bookmaker and defendant was a foolish person because in Dec., 1932, he made thirty bets with the plaintiff and lost twenty-eight of them. Therefore he must, as I say, be a foolish person. In 1932 the defendant owed the plaintiff £266 17*s.* 6*d.* on various betting transactions and he gave a number of cheques to the plaintiff in respect of them, which were dishonoured. In the autumn of 1935 the plaintiff had recourse to one Harrison Ford, who was the secretary of a society called the National Turf Protection Society, and on Nov. 3, 1935, the plaintiff brought the defendant to the secretary's office, where an agreement was arrived at. The agreement reads as follows:

I am indebted to Arthur James Latter in the sum of £266 17*s.* 6*d.* Now in consideration of his forbearance—at request—to press his claim before Tattersall's Committee to-morrow and upon the understanding that no other steps shall be taken which might be detrimental to me, I hereby undertake to settle the said sum of £266 17*s.* 6*d.* and upon discontinuance, the costs of the action commenced against me on April 27, 1934, as follows: by giving him a pair of bronzes (men) to-morrow Nov. 4, 1935, £20 likewise on Nov. 4, 1935, and £20 on Jan. 1, 1936, in settlement.

Should I default in the surrender of my bronzes and/or in due payment of any instalment, I agree that the whole then remaining balance of the original sum above-mentioned shall become due and payable forthwith.

(Signed)

Witnessed by Harrison Ford and A. J. Latter. L. J. Colwill.

Now, on Nov. 4, 1935, the defendant handed to the plaintiff the two bronze statues and also handed over the sum of £20 in notes, and if on Jan. 1, 1936, the defendant had paid the other £20, the whole of the agreement would have been carried out. As I have said, the defendant did hand over the bronzes and £20, but not the £20 in Jan., 1936. Now, according to the last clause in the agreement "should I default in the surrender of my bronzes and/or in due payment of any instalment, I agree that the whole then remaining balance of the original sum above-mentioned shall become due and payable forthwith." There had been a default in the payment of an instalment, namely, the second instalment of money. Now what, on Jan. 2, 1936, upon the defendant's failure to pay the second instalment, was the whole remaining balance of the £266 17*s.* 6*d.*? It is quite clear to me it is the sum of £20. It is quite clear to me that the debt is to be satisfied by the gift of two bronze statues and £40 in cash. When the bronzes are handed over and the first instalment paid the remaining balance of this debt is £20 only. So when, on Jan. 1, 1936, the defendant had failed to pay that sum, in my judgment the remaining balance of the original sum above-named, which had become due, was only £20. The result is that this action is not maintainable. The plaintiff's claim is for £218 17*s.* 6*d.* and is based upon this: that credit should be given for the bronzes to the extent

of £28 and also one sum of £20. The defendant has paid £20 into court. Some attempt has been made to give evidence of the value of these bronzes, but no evidence of this sort is admissible. In my judgment this action is wrongly conceived, except for £20, which the defendant failed to pay. On Jan. 13, 1936, the defendant sent his wife's cheque for £20 to satisfy the claim. Therefore this action has not any merit and the £20 has been paid into court. The proper order for me to make is judgment for the plaintiff for £20 without costs, and judgment for the defendant of the costs of the action from the date of his payment into court.

Solicitors : *Leslie Marrison* (for the plaintiff) ; *Kenneth Brown, Baker, Baker* (for the defendant).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

CHRISTIE AND OTHERS *v.* LORD ADVOCATE.

[House of Lords (Lord Blanesburgh, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Roche), **February 17 and March 6, 1936.**]

Estate duty—Assessment of duty—Settled property—Property passing on death—Cesser of life-rent interest—Finance Act, 1894, (*c.* 30), *ss.* 1, 2 (1) (*b*), 7 (5), (7).

A testator, who died in 1920, directed his trustees, *inter alia*, (i) to divide the balance of the annual income of the residue of his trust estate into ten equal shares, and to pay five of these shares to his widow, and one to each of his four daughters and his sister-in-law during their respective lives ; (ii) in the event of the death of any daughter leaving issue, to apply the share of the income payable to her for the maintenance of such issue until the youngest attained the age of 19, and thereafter to pay it in equal portions to such of them as were daughters during their lives ; and (iii) after the death of the testator's widow, to pay no beneficiary more than £600 per annum from the income of the trust. The testator was survived by his widow, his four daughters and his sister-in-law. In May, 1933, one daughter died leaving three children under age, and her one-tenth share of income at the time of her death was £2,800 per annum, derived from a one-tenth share of the testator's residue amounting approximately to £68,000, on which sum the trustees were assessed for estate duty on the footing that this sum, representing a part of the trust estate, had passed on the death of the daughter within the meaning of the Finance Act, 1894, s. 1.

Held : (affirming the judgment of the First Division of the Court of Session) that the trustees were rightly assessed, notwithstanding that the income of the daughter was liable to be reduced on the death of the widow to a sum not exceeding £600 per annum, as the 1894 Act disregards the future destination of the property.

[**EDITORIAL NOTE.** This case decides that in assessing estate duty upon settled property on the death of a tenant for life, the destination of the property after the

cesser of the interest of that tenant for life is not material. The assessment of duty is to be based upon the capital fund which produced the income of the deceased tenant for life and restrictions upon the enjoyment of that income by a subsequent tenant for life are not material.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 236, 237, para. 226, and for the Cases, see DIGEST, Vol. 21, pp. 9, 10, Nos. 34-42.]

Cases referred to :

(1) *Cowley (Earl)* v. *Inland Revenue Commissioners*, [1899] A.C. 198 ; 21 Digest 7. 27.

(2) *Re Cassel, Public Trustee* v. *Mountbatten*, [1927] 2 Ch. 275 ; Digest Supp.

(3) *Re Northcliffe, Arnholz* v. *Hudson*, [1929] 1 Ch. 327 ; Digest Supp.

Appeal from an Interlocutor of the First Division of the Court of Session.

The appellants were the trustees of the late Cyril Herbert Dunderdale who died on Oct. 31, 1930, and the executors of the late Mrs. Muriel Frances Norman (deceased's daughter) who died on May 25, 1933. The Commissioners of Inland Revenue were the respondents.

By note of assessment dated Mar. 16, 1934, the trustees were assessed for estate duty in a sum amounting (with interest) to £12,594 2*s.* 8*d.* in respect of property forming part of the testator's trust estate deemed to pass on Mrs. Norman's death and valued at £68,547 12*s.* 10*d.* The Commissioners, to whom the trustees appealed against the assessment, upheld it in its entirety. The Lord Ordinary in Exchequer Causes (Lord Carmont) recalled the assessment. A reclaiming note was presented by the Commissioners to the First Division of the Court of Session. On Dec. 19, 1934, the First Division (the Lord President (Lord Clyde), Lord Blackburn, Lord Morison and Lord Fleming) reversed the decision of the Lord Ordinary and upheld the original assessment. Thereupon this appeal was brought.

The pleadings and the arguments fully appear from the judgment.

James Keith, K.C., and *R. P. Morison* for the appellants.

The Lord Advocate (*T. M. Cooper, K.C.*), *J. H. Stamp*, and *T. B. Simpson* for the respondents.

Lord Russell of Killowen : My Lords, the late Cyril Herbert Dunderdale died on Oct. 31, 1930. By a trust disposition and settlement dated May 25, 1896, and three codicils thereto, he disposed of his estate in trust for the ends, uses and purposes therein mentioned, which for the purposes of this appeal may be summarised in manner following :— After providing for his debts, funeral and administration expenses, certain charitable subscriptions, and a pecuniary and specific legacy to his wife, he directed his trustees to apply the income of the residue of his estate (*primo*) in payment of annual remuneration to his trustees (*secundo*) in payment of a variable annual sum to his sister (*tertio*) if and so long as the net income, after deducting the payments to his sister,

exceeded £1,500 per annum the trustees were to pay such excess, up to £100 in each year, to the treasurer for the time being of the Representative Church Council of the Scottish Episcopal Church. Any excess over and above the said £100 was to be applied in the terms of the following provision, viz . :

(*quarto*) after payment of the foregoing provisions my trustees shall divide the balance of the annual income of the trust into 10 equal shares and shall pay five of these to my said wife, and one to each of my four daughters and to my sister-in-law . . . during their respective lives. And I provide and declare . . . that should any of my daughters die leaving issue the share of income which would have been payable to her shall be applied for the maintenance and education of her issue until the youngest of them shall have attained the age of twenty years, and thereafter shall be paid in equal portion during their lives to such of them only as are daughters.

The testator also provided that on the death of his sister-in-law or of any of his daughters without having issue, her share should accrue to his wife if surviving ; and that if his wife entered into a second marriage her share of the income should be restricted to one-fourth, the remaining three-fourths being equally divided between his daughters and his sister-in-law with a provision for the restoration to his wife in certain events of her original one-half. The testator then made provision (*quinto*) for what was to happen on the death of his wife, the effect of which was that from the time when his youngest surviving daughter should have attained the age of 19 years the balance of the income was to be divided equally among his sister-in-law and his daughters, the issue of any of his daughters who might have predeceased taking their parents share, but under the conditions as regards the said income that all males should cease to have any share or interest on their attaining the age of 20 years. And the testator further provided that after the death of his wife no beneficiary should receive more than £600 per annum from the income of the trust, and that the balance (after payment of all the surviving beneficiaries and after retaining in hand one half-year's income to meet contingencies) should be paid to the treasurer of the said Representative Church Council. Finally, the testator directed that after the death of the last survivor of his wife and daughters, and the female issue, if any, of his daughters, and of his said sister-in-law, and of three other named persons, his estate should be realised and the proceeds divided among certain charitable objects.

The testator was survived by his wife, his four daughters and his sister-in-law. His four daughters all attained the age of 19 years, with the result that for some time before the year 1933, the income of the trust estate belonged and was paid (as to one moiety) to the widow and (as to one-tenth) to the sister-in-law and (as to one-tenth each) to the four daughters. One-tenth amounted annually to £2,800 or thereabouts. On May 25, 1933, Mrs. Norman, one of the four daughters died. She

left three children, a boy (aged 12) and two girls (aged 9 and 7). Mrs. Norman's mother was then alive and had not remarried. On Mar. 16, 1934, the testator's trustees were assessed for estate duty in respect of part of his trust estate alleged to have passed on the death of Mrs. Norman, on the footing that the property which so passed was one-tenth of the whole trust estate, and that the value thereof was £68,547 12*s.* 10*d.* The trustees and the executors of Mrs. Norman appealed against the assessment to the Inland Revenue Commissioners, who maintained the assessment. The same persons then presented a petition under the Court of Exchequer (Scotland) Act, 1856, asking the court to recall the assessment. By his Interlocutor (dated Aug. 7, 1934), the Lord Ordinary in Exchequer Causes (Lord Carmont) recalled the assessment. Against this Interlocutor the Lord Advocate for and on behalf of the Inland Revenue Commissioners presented a Reclaiming Note to the First Division of the Court of Session as the Court of Exchequer in Scotland, upon which their Lordships (by Interlocutor dated Dec. 19, 1934) recalled Lord Carmont's Interlocutor, found that the trustees were liable to be assessed for estate duty in the value of one-tenth of the trust estate after deduction of income accrued to the date of Mrs. Norman's death, and dismissed the petition. It is from this Interlocutor that an appeal is brought to your Lordships' House.

The case discloses a difference of judicial opinion upon the points involved.

Lord Carmont held (following *Cowley* v. *I.R.C.* (1)) that there is a passing of property when one life-renter follows another in the enjoyment of the income of settled property, or—as he phrased it—the Finance Act, 1894, "has neither in view the interest of the deceased, nor the succession of the new taker of the subject, but the mere fact of the subject of a settlement moving along the intended line." He was accordingly of opinion that there was a true passing of settled property under sect. 1 of the Act. He, however, seems to have held that the property which passed was not the capital which produced the income enjoyed by Mrs. Norman, but the life interest of Mrs. Norman; and that such life interest with all its incidents (including its possibilities of reduction and, I suppose, increase) must be valued under sect. 7 (5) of the Act. As he had been asked only to state his findings on the points submitted, he recalled the assessment and continued the cause.

The Lord President was of opinion that (following the *Cowley* case (1)) one-tenth of the settled property passed on Mrs. Norman's death within the meaning of sect. 1: but that even if the case fell under sect. 2 (1) (*b*) the valuation under sect. 7 (7) would produce the same result as would be produced by a valuation under sect. 7 (5) of property passing within the meaning of sect. 1.

LORD BLACKBURN thought the case fell under sect. 2, but he nowhere in his judgment makes any reference to the *Cowley* case (1): he was, however, of opinion that what must be deemed to pass on Mrs. Norman's death was an interest which entitled her issue on her death to one-tenth of the income, and that the valuation under sect. 7 (7) must be on that footing and without regard to possible future reduction.

LORD MORISON's view was that the case was not a sect. 1 case, but one which fell within sect. 2 (1) (*b*), the value of the property which was thus deemed to pass being (under sect. 7 (7)) the principal value of one-tenth of the settled property.

LORD FLEMING held (following the *Cowley* case (1)) that one-tenth of the settled property passed on the death of Mrs. Norman within the meaning of sect. 1, and that the value of the property so passing fell to be determined under sect. 7 (5) of the Act. He was also of opinion that no different result as regards the amount of duty chargeable would flow if the case were held to fall under sect. 2 (1) (*b*) and sect. 7 (7).

It will thus be seen that the judges of the First Division, while agreeing in the result, were not unanimous in their views as to the sections which were applicable.

My Lords, I am of opinion (1) that the case is one in which property passed within the meaning of sect. 1, and that for the reasons given by LORD CARMONT, the LORD PRESIDENT, and LORD FLEMING; and (2) that the property which passed on the death of Mrs. Norman was the property which produced the one-tenth of the income to which she was entitled immediately before her death and which immediately thereafter became applicable for the maintenance and education of her issue. As LORD MACNAGHTEN stated in the *Cowley* case (1), the Finance Act, 1894, has no regard to the destination of the property which passes, or to the interest of the deceased, which, if it be a limited interest, can never pass. It was held in that case that on the death of the first equitable tenant for life under a settlement of real estate, the property which passed on his death was neither the interest of the first tenant for life, nor the interest of the second tenant for life who succeeded him, but the settled property. That case in my opinion is conclusive, and establishes that on the death of Mrs. Norman the life-renter of one-tenth, the settled property (which for this purpose is the capital fund which produced the income to which she was entitled) passed on her death within the meaning of sect. 1 of the Act. But the appellants here argued that even if this were so, nevertheless what should be valued for the purpose of arriving at the amount of duty payable, was the right to one-tenth of the income during the life of the testator's widow reducible on her death to an annual sum not exceeding £600. As authority for this proposition a decision of my own, viz., *Re Cassel* (2) was cited. That was indeed a very special case, in which, it having been decided that

the *Cowley* case (1) compelled me to treat it as falling within sect. 1 of the Act, it became apparent that no capital sum could be earmarked as producing either actually or notionally an annual sum which necessarily varied in amount within elastic limits. I indicated, as best I could, the lines upon which a valuation might be fairly reached. The case is certainly no authority justifying a departure from the principles laid down in the *Cowley* case (1), where, as here, a tenant for life of an aliquot share of settled property dies, and is succeeded by others who immediately enter into the enjoyment of the income of the same share. In this connection I would refer to the remarks of Maugham, J., in the case of *Re Northcliffe, Arnholz* v. *Hudson* (3) at pp. 331 and 332, which deal with the death of a tenant for life of an aliquot share of residue, and which appear to me relevant to a consideration of the present case.

My Lords, for the reasons which I have endeavoured to indicate, I would dismiss this appeal.

I ought to add that the widow of the testator has died since the Interlocutor of the First Division was pronounced; but this fact can have no bearing upon the matters in debate.

My Lords, I am authorised to say that my noble and learned friends, Lord Blanesburgh, Lord Thankerton and Lord Roche, all agree with the opinion which I have delivered.

Lord Macmillan: My Lords, I have had the advantage of reading in print the opinion which has just been delivered by my noble and learned friend on the Woolsack. I desire to express my entire concurrence with it.

Appeal dismissed with costs.

Solicitors: *Stoneham & Sons*, for *Simpson & Marwick*, Edinburgh, (for the appellants); *Sir John Houldsworth Shaw*, for *Stavi A. Gillon*, Edinburgh (for the respondents); *Solicitor of Inland Revenue.*

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

BEER *v.* W. H. CLENCH (1930), LTD.

[KING'S BENCH DIVISION (Talbot, Macnaghten and du Parcq, JJ.), **March 2, 4, 1936.**]

Evidence—Record of hours worked—Required to be kept by statute—Road Traffic Act, 1930 (*c.* 43) *s.* 19—*Road and Rail Traffic Act*, 1933 (*c.* 53), *s.* 16.

In a prosecution of the respondents for permitting the driver of a motor vehicle belonging to them constructed to carry goods, to drive on one day for continuous periods amounting in the aggregate to more than 11 hours contrary to the Road Traffic Act, 1930, s. 19, the only evidence tendered in support of the information was the "current record" of hours worked kept by the respondents' driver as required by the Road and Rail Traffic Act, 1933, s. 16:—

HELD: inasmuch as the "current record" was one which the statute required to be kept and to be kept accurately it was properly admissible in evidence against the respondents though they naturally delegate the actual manual keeping of it to their drivers, or other servants.

[**EDITORIAL NOTE.** The admissibility of the evidence in this case is based upon its being an admission by the party charged with the offence, and the difficulties were two: (i) that the statute had not made such records admissible as evidence; (ii) that the records were not made by the party charged, i.e., the owners of the cars, but by the drivers themselves or other servants of the company. The difficulties were met by the consideration that the records were required to be kept by the Statute and to be kept accurately, and they, that being their duty, and the company being fully entitled to check the record thoroughly, they ought to take all reasonable care that the record is a correct one and so adopt it as their own.

FOR ADMISSIONS BY PARTIES CHARGED WITH OFFENCES, see HALSBURY, Hailsham Edn, Vol. 9, p. 203, para. 391, and FOR THE CASES, see DIGEST, Vol. 14, pp. 403, 404, Nos. 4234-4245.]

Cases referred to:—

(1) *Cox* v. *Sidery* (1935) unreported.
(2) *R.* v. *Mallory* (1884), 13 Q.B.D. 33; 14 Digest 392, *4135*.
(3) *R.* v. *Norton*, [1910] 2 K.B. 496; 14 Digest 393, *4137*.
(4) *The Earl of Dumfries* (1885), 10 P.D. 31; 1 Digest 198, *1152*.
(5) *The Solway* (1885), 10 P.D. 137; 22 Digest 372, *3805*.
(6) *The Little Lizzie* (1870), L.R. 3 A. & E. 56; 1 Digest 199, *1161*.
(7) *Swan* v. *Miller, Son & Torrance, Ltd.*, [1919] 1 I.R. 151; 12 Digest 83, *489* (*ii*).

APPEAL on a case stated by the justices of the County of Middlesex on the dismissal of an information preferred by Richard Thomas Beer, a traffic examiner appointed under the Road and Rail Traffic Act, 1933, against W. H. Clench (1930), Ltd., that they, on Apr. 16, 1935, employed a person to drive a motor vehicle constructed to carry goods other than the effects of passengers for continuous periods amounting in the aggregate to 13½ hours, being 2½ hours in excess of the time permitted by the Road Traffic Act, 1930, s. 19. The information was heard and dismissed on Oct. 17, 1935.

The Solicitor-General (*Sir Donald Somervell, K.C.*) and *Valentine Holmes*, for the appellant: The decision of the justices was wrong.

The offence is a statutory offence and there is a statutory provision for a record being kept of the information necessary to establish the offence. It is an offence which it would be extremely difficult to detect in the absence of records. Parliament has provided that this record shall be kept and the owner is under a duty to keep a correct record of the time the drivers are on duty. The words of the statute are very strong and it must have been intended that the record should be admissible as evidence. It is not conclusive but should not be excluded as *prima facie* evidence. As a general principle of the law of evidence, a document can be relied upon as an admission if there is evidence that the correctness of the statements therein has been recognised or adopted by the person accused. If there is evidence that the person accused has recognised or adopted it, it is an admission against him. That is what happened in the present case as the owner produced it as a correct record.

[He referred to *R.* v. *Mallory* (2), *R.* v. *Norton* (3), *The Earl of Dumfries* (4), *The Solway* (5), *The Litile Lizzie* (6), *Cox* v. *Sidery* (1).]

W. N. Stable, K.C., J. H. C. Goldie, and *R. A. L. Hillard,* for the respondents: The decision of the justices was right and the document was rightly rejected as not being admissible as evidence. The document tendered in this case was hearsay. The statutory provision was against driving more than 11 hours, but the record required under the regulations is not merely the time spent in driving but a record of the time spent on work. Even if the form was properly admitted as truth of the facts stated therein, it did not prove anything whatever, as the driver had to include in his return all the work he did whether the work was done in connection with the vehicle or its load or otherwise. There was a danger of admitting such a document as evidence as the employer would be in a difficulty if inaccurate statements were inserted in it. Similar provisions in the Companies Act, 1929, and the Factory and Workshop Acts provide that the documents shall be admissible in certain cases, but as regards the present case there was no such provision. There is no rule of evidence that gives a servant, whether he is under a statutory obligation to write something or not, power to write down that his principal has committed a crime and that be evidence against the principal because the man happens to be his servant. [He referred to *Swan* v. *Miller* (7).]

Talbot, J.: This is the judgment of the court.

This case stated by three justices for the County of Middlesex, relates to a prosecution in a court of summary jurisdiction sitting at Tottenham, of the respondent company for permitting the driver of a motor vehicle belonging to them constructed to carry goods, to drive on one day in April of last year for continuous periods amounting altogether to 13½ hours, being 2½ hours more than 11 hours, contrary to the Road Traffic

Act, 1930, s. 19. That section enacts, leaving out immaterial words, as follows :

(i) With a view to protecting the public against the risks which arise in cases where the drivers of motor vehicles are suffering from excessive fatigue, it is hereby enacted that it shall not be lawful in the case of . . . (*c*) any motor vehicle constructed to carry goods other than the effects of passengers ; for any person to drive or cause or permit any person employed by him or subject to his orders to drive . . . (ii) for continuous periods amounting in the aggregate to more than 11 hours in any period of 24 hours commencing 2 hours after midnight.

The only evidence tendered in support of the information was the "current record" kept by the respondents' driver as required by the Road and Rail Traffic Act, 1933, s. 16, and the regulations made thereunder. By that section the respondents, as holders of a licence under the Act, are required to keep, or cause to be kept, current records showing, amongst other things :

As respects every person employed by him as a driver or statutory attendant of an authorised vehicle, the times at which that person commenced and ceased work and particulars of his intervals of rest.

There are provisions (see subsect. (4) of the same section) for the preservation of the records and production of them to the licensing authority and certain others, for inspection. In a case of *Cox & Sons* v. *Sidery* (1), decided by this Court in October last, it was held that the obligation imposed by sect. 16 of the Act of 1933, is (as it must be if the section is not to be futile) to keep, not only a record, but a true record. The respondents in that case were prosecuted and fined for failing to keep a record stating accurately one of the particulars which the Act requires to be recorded, although it was admitted or proved that they had no knowledge of the error. The current record tendered as evidence in the case now before us was, we were informed, produced to the licensing authority in pursuance of sect. 16 (4) of the Act of 1933, by the respondents, and was tendered in evidence by the prosecutor before the justices, who was one of the traffic examiners appointed under that Act. It was argued for the prosecutor that the record was evidence against the respondents as containing admissions by them, and the particular admission relied on was the statement in the record that on the day in question a driver named Munro "worked excluding intervals of rest" for 13 hours and 30 minutes, or 2½ hours beyond the 11 hours mentioned in sect. 19 of the Act of 1930. A copy of the relevant part of the record is annexed to, and forms part of, the case. The respondents' contentions are stated in para. 6 of the case as follows :

(1) That the appellant could not prove the document tendered in evidence since the appellant was unable to prove by any method the handwriting of the person or persons who purported to have made the entries therein. (2) That the only method of providing the truth of the contents of the said document was to call a person who

could speak as to the facts therein mentioned and that the appellant who admitted that he had no knowledge as to the truth of the contents of the said document could not give such proof. (3) That the said document was hearsay evidence. (4) That the statements contained in the entries upon the said document were unsworn. (5) That to admit such evidence would deprive the respondents of the opportunity of cross-examination. (6) That the said statute and the regulations made thereunder had not made the said document admissible as *prima facie* evidence of its content. (7) That the entries were not admissions since they were not made voluntarily and since an admission sought to be used in criminal proceedings must be made by the party charged.

It is obvious that these objections are for the most part technical. Counsel for the respondents enlarged upon serious hardships and dangers involved by the admission of this record in evidence. We cannot help thinking that these perils are really in the main quite fantastic. The justices refused to admit the evidence tendered, and (there being no other evidence) dismissed the information. In our opinion this decision cannot be supported. We base this opinion upon this simple fact. The document rejected is a record which the statute and the regulations require the respondents to keep, or cause to be kept, and to keep accurately. They are responsible for it, though they naturally delegate the actual manual keeping of it to their drivers, or other servants. This delegation does not, of course, mean that they are not fully entitled to check what is entered in any way which they think proper, and no doubt they ought to take all reasonable care to see that the record is correct. When they produce it for inspection, as the Act requires, they clearly represent that it is correct; in other words, that they have discharged the duty which the Act lays upon them.

The argument for the respondents appears to us resolutely to ignore this point, which is, in our opinion, decisive of the case. We cannot see how it can be said that this is not a statement which can be used against the respondents. It is not suggested that it is conclusive. If they had not objected to the admission of it, they would have had full opportunity of correcting or explaining it. If it remained without contradiction or explanation, it proved the case against them. We cannot doubt that at least one object for which the keeping of these records is required by Parliament is that the proper parties should readily know when to prosecute, and should be able, without undue expense and complication, to prove the commission of an offence under the Act if one were committed.

A further point was taken by counsel for the respondents, but we agree with the Solicitor-General that it is not open to them on this case, which refers to this court one question only, which is stated in paras. 8 and 9 of the case:

> We being of opinion that the contentions of the respondents were right, refused to admit the said record in evidence and since no other evidence was offered by

the appellant dismissed the said information. The question upon which the opinion of the court is desired is whether upon the above statement of facts, we came to a correct determination and decision in point of law and, if not, what should be done in the premises.

Apart from this, we think the point rests on a misconception. The point is that whereas the limit of hours of work under sect. 19 of the Act of 1930 is confined to driving, the statement in the record of the hours actually worked applies to work generally, and that "work" as defined in the regulations made under sect. 16 and other sections of the Act of 1933, called the Goods Vehicles (Keeping of Records) Regulations, 1934, goes much beyond driving. This contention, as was pointed out in the argument, overlooks the fact that the relevant form was to be used only by "full time drivers," that is persons "employed solely in driving"; in other words, "work" in the mouth of such a man must mean work as a driver only.

We answer the question put to us by saying that in our opinion the justices did not come to a correct determination or decision in point of law when they refused to admit the record in evidence, and the case must go back to them with a direction to admit the evidence tendered, and to hear and determine the case accordingly.

Solicitors: *The Treasury Solicitor* (for the appellant); *Mawby, Barrie & Letts* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

TRADE INDEMNITY COMPANY LIMITED *v.* THE WORKINGTON HARBOUR AND DOCK BOARD.

[House of Lords (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Roche), **January 13, 14, 16, 17 and February 11, 1936.**]

Guarantee—Duty to disclose—Contracting out of disclosure—Variation—Loans to principal debtor.

Building contracts—Contract for construction of dock—Engineer's certificate—Inclusion of items outside contract.

A firm of contractors agreed to construct a new and enlarged dock. The Dock Board required a guarantee for the performance of the contract and the defendants gave a joint and several bond in the sum of £50,000 conditioned for the due performance of the contract :—

Held : (i) this was a contract of guarantee and not of insurance.

(ii) by clause 7 of the agreement the Dock Board had made it clear that they were a non-disclosing body and they had thereby contracted out of any duty to disclose.

(iii) loans of £45,000 made to the contractors by the Dock Board out of a fund provided by the Treasury under the Trade Facilities Act, 1921, and of which the guarantors had no knowledge, were outside the construction contract and therefore outside the guarantee ; and no certificate of the Dock Board engineer, though agreed to be final and binding upon them, could make the guarantors liable in respect of such loans.

(iv) such advances, though repayable by an increased percentage of retention money, were not a variation of the contract and therefore not a discharge of the guarantors.

[**EDITORIAL NOTE.** It is said that the distinction between a contract of insurance and of guarantee is that a person insuring has the means of knowledge of the risk that is undertaken, which the insurer has not, but a surety must be taken to know that the risk he is undertaking or if he does not, he should himself make proper inquiries. This case, while it still leaves open the question of the duty to disclose in the case of a guarantee, clearly decides that it is open to any party to "contract out" of any duty to disclose and to throw the whole burden of inquiry, even as to the nature of one's own land, upon the other side. It also decides that the usual form of indemnity bond insuring the performance of a contract, though usually spoken of and dealt with in commercial circles as an insurance, is in its nature a guarantee. The case then turns to a difficult question of such variation of the original contract as will release the guarantor. The contractor obtained from the Dock Board in two sums £45,000, which it was argued were advance payments under the contract ; but it was held that the true view of the transactions was that these payments were loans and outside the contract, though their repayment was intermingled with payments under the contract. Once it is settled that these payments were loans outside the contract, any question of variation of the contract and consequent discharge of the guarantor goes, since the guarantor is not concerned with them or their repayment

For the Law on (i) Disclosure in Contracts of Guarantee, see HALSBURY, Hailsham Edn., Vol. 16, pp. 130, 131, para. 154, and for the Cases, see DIGEST, Vol. 26, pp. 210-215, Nos. 1649-1701. (ii) Variation on a Discharge of the Surety, see HALSBURY, Hailsham Edn., Vol. 16, pp. 133, 139, para. 158, and for the Cases, see DIGEST, Vol. 26, pp. 163-165, Nos. 1225-1244. (iii) Finality of Architect's or Engineers' Certificate, see HALSBURY, Hailsham Edn., Vol. 3, pp. 249-251, para. 436-438, and for Cases, see DIGEST, Vol. 7, pp. 356-360, Nos. 94-112.]

Cases referred to :

(1) *Railton* v. *Mathews* (1844), 10 Cl. & Fin. 934 ; 26 Digest 214, *1686.*

(2) *London General Omnibus Co., Ltd.* v. *Holloway.* [1912] 2 K.B. 72 ; 26 Digest 214, *1691.*

(3) *Goodyear* v. *Weymouth & Melcombe Regis Corporation* (1865), Har. & Ruth. 67 ; 7 Digest 381, *199.*

(4) *Laidlaw* v. *Hastings Pier Co.* (1874), 2 Hudson's B. C., 4th Edn. 13 ; 7 Digest 382, *200.*

(5) *Lapthorne* v. *St. Aubyn* (1885), 1 Cab. & El. 486 ; 7 Digest 382, *202.*

APPEAL from an order of the Court of Appeal allowing an appeal by the plaintiffs from a judgment of LAWRENCE, J. The facts and arguments are fully set out in the judgment of LORD ATKIN.

R. P. Croom-Johnson, K.C., Walter Monckton, K.C., H. J. Astell Burt and *Mrs. A. G. Morrice*, for the appellants.

Sir William Jowitt, K.C., N. L. C. Macaskie, K.C., A. Inman, K.C., and *L. Mead*, for the respondents.

LORD ATKIN (read by LORD RUSSELL OF KILLOWEN) : My Lords, this is an appeal from an order of the Court of Appeal setting aside the order of LAWRENCE, J., at the trial, who gave judgment for the defendants, and directing judgment to be entered for the plaintiffs. The action arises out of a contract, dated Oct. 23, 1922, by which a well-known firm of contractors, Kirk & Randall, Ltd., agreed with the present plaintiffs, the Workington Harbour and Dock Board, to construct a new and enlarged dock at Workington. The Dock Board required a guarantee for the performance of the work, and on Oct. 11, 1922, the defendant company entered into a joint and several money bond in the sum of £50,000 conditioned for the performance by the contractors of their contract. The contractors failed to perform the contract, and the defendants, the Indemnity Company, are now sued on the bond. Various defences were raised at the hearing which will be discussed in due course. The principal defence which involved a prolonged investigation of facts depended upon allegations of non-disclosure of material facts by the plaintiffs. The Judge on this point found for the defendants. He found that the plaintiffs had innocently misled the contractors in respect of a material fact, viz., the amount of water that had to be dealt with by the contractors in course of construction, and that having so misled the contractors they could not enforce the guarantee against the defendants. The Court of Appeal negatived the fact of the misrepresentation, and further held that on the terms of the contract, if made, it did not bind the Dock Board. They rejected the plea of non-disclosure ; they do not appear to have been in agreement as to whether there exists in general in respect of persons taking a guarantee a duty to disclose material facts which is greater than the duty to disclose in ordinary contracts, but they were all agreed that in the present

case there was no duty on the Dock Board to make any such disclosure as the defendants had alleged. I believe that all your Lordships approve the decision of the Court of Appeal on this point, and it will not be necessary to discuss in detail the facts concerning it which are set out in the notable judgment of the late Scrutton, L.J., apparently the last judgment which that great Judge delivered. The substance of the case is that the work of constructing the new dock involved considerable excavation of ground between the existing dock and the sea, ground which was below the high tide level. Tenders had been invited from leading contractors on plans and specifications prepared by an eminent firm of engineers, Messrs. Rendel, Palmer & Tritton. The tender of Messrs. Kirk & Randall was the lowest, £284,119; the next highest tender was £326,223. The instructions to persons tendering made it perfectly plain that the Dock Board threw the whole responsibility upon the contractor for obtaining information as to the nature of the ground and any physical difficulties which he would have to meet. I will not read the whole document but must refer to a few clauses.

2. The contractor must obtain for himself on his own responsibility and at his own expense, all the information which may be necessary for the purpose of making a tender and entering into the contract and must examine the general conditions and specification and the above-mentioned documents and inspect and consider the site and surroundings.

3. The contractor must also inspect and satisfy himself as to the nature of the existing roads, waterways, railways, sidings and other means of communication and access to, and egress from the site and works, the existing railways and sidings on the site and the available accommodation as regards land (whether without or within the site), the facilities for mooring or berthing vessels, and the buildings that may be required for temporary purposes in connection with the construction, completion and maintenance of the works, and must make his own inquiries as to workyard sites and depots and dumps, and as to the acquisition of such additional sites and areas as may be necessary for temporary purposes for constructing, completing and maintaining the works. 4. He must also, notwithstanding any information given on the drawings, or in the documents herewith, make local and independent inquiries as to the nature of the surface, strata, soil, subsoil and/or ground to be excavated or built upon or into which piles have to be driven, as to the beds of the sea, river, harbour, dock and/or channel to be deepened or dredged or in or upon which the works or temporary works have to be constructed, and the nature and height of the tides, and levels and inclinations of the site and the foundations of the several works, and form his own estimate as to the pumping power, temporary works and appliances required to keep free from water, from any source, any and every part of the works which is or may be required by the engineers to be executed in the dry. 5. He must also satisfy himself as to the sources of supply and sufficiency of the different materials referred to in the specification or indicated on the drawings, and as to the provision of water for the works, and must examine and consider all other matters and all possible and probable contingencies and generally must obtain his own information on all matters affecting the construction, completion and maintenance of the works, and as to all matters which may influence him in making his tender and fixing the several rates and prices therein. 6. No claim

for additional payment beyond the prices or rates in the schedule of prices, or other the prices or rates to be determined by the engineers as in the general conditions mentioned, will be entertained, nor shall the contractor be entitled to make any claim on the ground of any representation, or on the ground that the contractor was supplied with information or given any promise or guarantee by any person (whether in the employ of the Workington Harbour and Dock Board or not), nor shall any failure on his part to obtain all necessary information for the purpose of making his tender and fixing the several prices and rates therein relieve him from any risks or liabilities in connection with or for the due fulfilment of all his obligations in the contract contained. 7. Should there be any doubt or obscurity as to the meaning of any of the contract documents, or as to anything to be done, or not to be done, by the accepted tenderer, or as to these instructions, or as to any other matter or thing, the person tendering must set forth such doubt or obscurity in writing and submit the same to the clerk and manager, Workington Harbour and Dock Board, Workington, Cumberland, not later than one week before the date fixed for the delivery of tenders, and except such reply as the clerk and manager may in writing give, neither the engineers, nor any member agent, or servant in their employ, or in the employ of the owners, has any authority to make any representation or explanation to persons tendering, as to the meaning of the indenture of contract, general conditions, specification, schedule of prices, schedule of wages and materials, day-work schedule, drawings or other documents, or as to anything to be done or not to be done by the accepted tenderer for the works, or as to these instructions, or as to any other matter or thing, so as to bind the Workington Harbour and Dock Board or bind or fetter the judgment or discretion of the engineers in the exercise by them of their powers and duties under the contract.

The ground was in fact waterlogged; and Sir Frederick Palmer, the head of the firm of engineers, obviously formed the belief that Messrs. Kirk & Randall, whom I will hereafter call the contractors, had underestimated the amount of water with which they would have to contend. He was an acquaintance of one of their directors, and on Sept. 1 he took the unusual course of warning Mr. Duckham, a director of the contractors and their representative on this contract, that their estimate was too low and gave them an opportunity of withdrawing. He indicated pretty plainly that the mistake was in the price for excavating. Mr. Duckham preferred to adhere to his tender. A suggestion was made at the trial that he had been misled by a clerk of the Dock Board as to the flow of water into a trial hole which the Dock Board had caused to be made for the convenience of the persons tendering. It is plain that Mr. Duckham was not entitled to rely upon any such representation even if made, and that the clerk had no authority to bind the Dock Board. The Dock Board, on the advice of the engineers, were only willing to accept the contractors' tender subject to their furnishing a guarantee of £50,000 for the performance of the contract, and on Sept. 6, 1922, wrote to the contractors accepting their tender on that condition. The contractors set about obtaining the required guarantee and eventually arranged with the present defendants to enter into the contract which is the subject matter of this action, and is dated Oct. 11,

1922. Meanwhile the contractors appear to have had misgivings about the water, and on Sept. 20 wrote to the engineers stating that they had based their estimate on replies to inquiries as to the rate of flow of water in the trial hole; they were dissatisfied and wished to know the true position. In Mr. Palmer's absence they were invited to meet a Mr. Darling, employed by the engineers as their chief assistant; and accordingly on Sept. 22, there was an interview between Mr. Darling and Mr. Duckham. There was a controversy as to what took place; Mr. Duckham alleging that the information he had received as to the slight flow of water in the trial hole was confirmed, Mr. Darling denying it. The controversy involves the further question whether the trial hole in question was or was not a closed hole at the date of the alleged flow, in which case the flow of water would, of course, give no information of value. It would merely be the result of leakage. It is on this point that the learned Judge found that the contractors had been misled by the engineers. It is unnecessary to consider whether the finding is correct, for it is plain that Mr. Darling had no authority to bind the Dock Board by any representations. The instruction to the tenderers made plain that the only means of obtaining binding representations was by written information from the clerk to the Board (Instructions, clause 7).

On Sir Frederick Palmer's return, after an interview between him and Mr. Duckham on Oct. 4, the contractors, at Sir Frederick's suggestion, by a letter of Oct. 5, withdrew their letter of September 20, expressing themselves satisfied by Mr. Darling's statements. At the interview Sir Frederick Palmer again offered to allow the contractors to withdraw their tender, but they declined. On Oct. 11, the defendants entered into the contract in question after making inquiries as to the financial position of the contractors, and on Oct. 23 the contract for the construction of the works was executed.

The first question that arises in regard to the plea of non-disclosure is whether the contract is one of insurance or of guarantee. The form of the contract is a money bond for £50,000 conditioned for the performance by the contractors of the contract in all things whatsoever. The defendants are described in the bond as the "surety"; but they say they are an insurance company; they were approached through insurance agents; that this is a well-known form of insurance business; and that they have re-insured their risks with other persons carrying on business in the insurance world, notably at Lloyd's. On the other hand, the contract demanded by the Dock Board was a guarantee; the defendants in the contract style themselves sureties; the contract appears in substance to be a contract to answer for the debt, default or miscarriage of another; and the express provisions negativing release of the "surety" upon a variation of the contract or forbearance as to time indicate that the parties were thinking of the law as to guarantees. I entertain no

doubt that this was a guarantee ; and the rights of the parties should be regulated on that footing. I may be allowed to remark that it is difficult to understand why business men persist in entering upon considerable obligations in old-fashioned forms of contract which do not adequately express the true transaction. The traditional form of marine policy is perhaps past praying for ; but why insurance credits or contracts if insurance is intended or guarantees of the same if guarantees are intended should not be expressed in appropriate language passes comprehension. It is certainly not the fault of lawyers.

We have to decide the case on the footing that the contract sued on was a guarantee. There may be a question whether in the formation of a contract of guarantee there is an obligation on the promisee to make a disclosure of material facts which would not exist in the formation of an ordinary contract. There are decisions in the case of fidelity guarantees : *Railton* v. *Matthews* (1) and *London General Omnibus Company* v. *Holloway* (2), which would have to be examined if the point arose here for decision. But it is clear that in whatever way any duty to disclose arises and whether the promisee is under a positive duty to disclose material facts, which is one view, or is supposed to represent that the transaction sought to be guaranteed has no unusual or abnormal characteristics, making him the author of a misrepresentation innocent or fraudulent as the case may be, which is another view, the duty or the implied representation will depend upon the particular circumstances of each transaction. In this case the one outstanding feature is that the Dock Board took every care to make it plain that they left it to the proposed contractors to ascertain for themselves all material facts relating to the conditions under which the contract would be performed, and guarded themselves in precise terms against liability for any representations made otherwise than in accordance with clause 7 of the instructions to tenderers. In short, they made it clear that they were a non-disclosing body ; and this intimation was plainly made to the defendants, for the relevant documents were incorporated in the contract of guarantee. For myself I doubt, in the course of business alone, whether a guarantor looks further than the skill and experience of the contractor to guard against risks of unknown difficulties in the performance of such a contract. That seems to accord with the evidence of Mr. Patrick, the manager and contractor of the defendant company. The guarantors are in such a case primarily concerned with the financial ability of the contractors to complete this contract whether it result in a loss or not. On this topic they did in this case make the necessary inquiries. But whatever be the general course of business, in this case, as I have said, the Dock Board have freed themselves from any obligation whether as to disclosure or as to misrepresentations.

I can find no difference in the various facts pleaded as being undis-

closed, whether it be the existence of excessive water causing abnormal expenditure (5 (*a*)) or the failure of the contractors to estimate for such abnormal expenditure in fixing the price (5 (*b*)) or the gross inadequacy of the price (5 (*c*)) or the offer by the engineers to release the contractors (5 (*d*)). I think that in the circumstances of this particular case the Dock Board were under no obligation to disclose any of them. I have, I think, made it plain that it has been unnecessary to pass any opinion upon the general law as to disclosure in respect of guarantees, and that this case is decided upon its own facts. I am of opinion that the Court of Appeal was right in concluding that the defence failed on this issue.

There remains, however, a further defence based upon loan transactions which took place unknown to the defendants between the Dock Board and the contractors during the course of the contract. Work was begun in October, 1922 ; early in 1924 the contractors found themselves in financial difficulties, and acquainted the engineers with the position. Unless some relief were given the work would have been stopped. An arrangement was made by which out of the fund loaned to the Board under the Trade Facilities Act the Board lent to the contractors the sum of £20,000 with interest at 5 per cent. on the terms of a written agreement dated Apr. 22, 1924, the terms of which I must read.

An Agreement made the twenty-second day of April one thousand nine hundred and twenty-four between Kirk and Randall Limited whose registered office is situate at Nos. 146/7, Grosvenor Road, S.W.1 (hereinafter referred to as " the contractor ") of the one part and the Workington Harbour and Dock Board incorporated by the Workington Harbour and Dock Act 1905 (hereinafter referred to as " the Board ") of the other part supplemental to a contract (hereinafter referred to as " the contract ") bearing date the twenty-third day of October one thousand nine hundred and twenty-two and made between the contractor of the one part and the Board of the other part whereby the contractor undertook to execute certain works of demolition and construction of new works in the construction and completion of an extension of the Lonsdale Dock Workington and of a new entrance thereto as more particularly specified in the contract and the general conditions specifications and drawings thereto annexed. Whereas the contractor recently informed the Board that they were experiencing very considerable difficulties in financing the work of the contract in consequence of the heavy expenditure already incurred by them including an expenditure of thirty-four thousand pounds in machinery now upon the site and that unless some financial assistance were afforded they would have no alternative but to close down and stop work under the contract within the next fortnight. And whereas the Board thereupon applied to and obtained the sanctions of the Lords Commissioners of His Majesty's Treasury to withdraw from the Fund loaned to the Board by the Lords Commissioners of His Majesty's Treasury on the recommendation of the Advisory Committee nominated by the Treasury pursuant to the provisions of the Trade Facilities Act 1921 the sum of twenty thousand pounds and to advance the same to the contractor on account of the said works on the condition that the advance shall be repaid by a special reduction of fifteen per centum in addition to the retention moneys of ten per centum under the contract from all future payments in respect of works in connec-

tion with the contract to be certified by the engineers approved by the Treasury together with interest at the rate of five per centum per annum upon the amount of the said advance from time to time unliquidated Now these presents witnesseth and it is hereby agreed and declared as follows :—The contractor hereby admits and acknowledges the advance by the Board of the sum of twenty thousand pounds on account of the works of the contract and hereby declares and agrees that such advance shall be repaid and liquidated by means of a special reduction of fifteen per centum (in addition to the retention moneys under the contract of ten per centum) from all future payments for works in connection with the contract to be made to the contractor as certified by the said engineers with interest at the rate of five per centum upon the amount of the advance from time to time unliquidated Provided always and it is hereby expressly agreed and declared that in case of any breach by the contractor of any of the terms and conditions of the contract or in the event of an execution or distress being levied or enforced against any property of the contractor or of an order being made or an effective resolution passed for the winding up of the contractor or if a receiver be appointed of the property and assets of the contractor or any part thereof then the said advance of twenty thousand pounds with interest thereon at the rate of five per centum per annum calculated from the date hereof or the amount of the said advance for the time being unliquidated with five per centum interest thereon as aforesaid as the case may be shall forthwith become due and payable by the contractor to the Board on demand and in the event of non-payment shall be deemed to be part of " the cost of completing the work " within the terms of clause 86 of the contract and all the rights powers and remedies of the Board against the contractor under clauses 85 and 86 of the contract shall thereupon arise and come into force as regards the said advance on the amount thereof for the time being unliquidated with the interest thereon as aforesaid as if the default in payment of the said amount on demand had been specifically mentioned in the contract as one of the events upon the happening of which the rights powers and remedies of the Board shall arise.

A similar transaction took place on Oct. 28, 1925, by which on the terms of an agreement of that date in similar terms a further advance of £25,000 was made. The only evidence of the sum due from the contractors in respect of which £50,000 was claimed from the defendants was the certificate of the engineers dated Jan. 8, 1932, certifying that £78,785 14*s.* 7*d.* was due. It is admitted that this sum includes the balance due upon these loans for principal and interest. How large the balance was was not proved, but it is at least possible that apart from such balance the sum due from the contractors would be less than the £50,000 for which the Dock Board have recovered judgment from the defendants. It is said in defence that the defendants never undertook the burden of guaranteeing this payment, and that at any rate to the extent of the unpaid balance of the loan they are under no liability, and as the only proof of the contractors' debt is a certificate which includes an unknown quantum of unpaid loan there is no proof of the amount of their liability, and that they are entitled to judgment. The plaintiffs rely upon the terms of the guarantee to meet this defence.

1. They say that these loans were merely advances made under clause 79 of the contract which provides that no money shall be due or

payable to the contractor except under the signed certificate of the engineer, but "subject thereto the owners will make advances monthly to the contractor" in sums not less than £5,000 at the rate of 90 per cent.; the 10 per cent. deduction to make up a retention sum of £25,000; afterwards "all advances will be made on the value of the work as certified . . . but the owners may in their discretion make advances at greater rates, at more frequent intervals or in smaller sums."

My Lords, this contention, which found favour with the Court of Appeal, appears to me quite untenable. The clause provides for payments to the contractor not as loans but as part payments of the price, the payments are to be made on the engineers' certificates of work done, and the discretion to pay at greater rates means at greater rates than 90 per cent. of the value of the work certified. How that claim can be applied to loans of £20,000 and £25,000 on which interest is charged without any certificate such as is contemplated in the clause I cannot see.

2. It was further said that the claim was covered by the words in the guarantee, "provided further that the surety shall be bound by all decisions opinions orders directions requisitions and/or certificates of the said engineers under the provisions of clauses 106 and 107 of the contract as the contractors are so bound." I agree with Maugham, L.J., that this must mean "bound under the provisions of clauses 106 and 107, as the contractors are bound, by all decisions, etc., of the said engineer." But when clause 106 is examined it will be found to relate solely to claims by the contractor. The clause reads: "Claims by the contractor . . . including questions as to the quality, etc., of materials . . . and as to all other matters and things left to or dependent on the decision, etc., of the engineers." The clause begins with claims by the contractors, it ends with claims by the contractors, and I cannot think that the words relied on by the Dock Board "as to all other matters and things left to the decision of the engineers" can naturally be construed as containing a reference to claims by either the contractors or the owners, a construction which grammatically would be distorted. The words referring to "liquidated damages for delay" which were relied on appear to be quite inconclusive. They occur in the section of the clause which beyond all controversy relates solely to claims by contractors; and appear to me to refer to disputes raised by contractors objecting to their claims being reduced by sums claimed *contra* for liquidated damages. Whether the person preparing the contract intended the clause to refer to both parties I do not know, but looking at the contract as a whole I can only say that it would not surprise me to find that only the contractor was intended to be bound. In any event such seems to me to be the true meaning of the words used.

3. It was then said by the respondents that though the loans and the certificate could not be justified under the original contract, yet the

proviso to the condition of the bond expressly preserves the liability of the surety. I will read it :

> Provided always and it is hereby agreed and declared that the surety shall not be released or discharged from the above written bond by any arrangement which may either with or without the assent or notwithstanding the dissent of the surety be made between the contractors and the owners or between the contractors and the engineers in the contract mentioned for any alteration in or to the said works or the contract or any forbearance by the owners or by the said engineers whether as to payment time performance or otherwise howsoever or by any dealing or transaction which may take place between the contractors and the owners or between the contractors and the said engineers or by any act or default of the said engineers or by any act or omission to act by the owners in consequence of the said engineers acts or defaults and provided further that the surety shall be bound by all decisions opinions orders directions requisitions and/or certificates of the said engineers under the provisions of clauses 106 and 107 of the contract as the contractors are so bound.

The words "any arrangement . . . for any alteration in or to the said works or the contract" are very wide. Probably they would have to be cut down so as not to include such changes as have been suggested as substituting a cathedral for a dock, or the construction of a dock elsewhere, or possibly such an enlargement of the works as would double the financial liability. An author of great authority, happily still with us, suggests that such words only relate to alterations "within the general purview of the original guarantee" (ROWLATT on the LAW OF PRINCIPAL AND SURETY, page 118). But, in my opinion, the loan contracts were not alterations of the original contract at all. The contract was for the construction of specified works at specified prices. The loans were independent borrowings to enable the contractors to perform the construction contract. The position is, in my opinion, just the same as if the contractors had borrowed the money from their bank, or directly from the Trade Facilities Board, and had charged their payments under certificate with repayment by proportionate deductions. The loans were, of course, connected with the contract and were made for the purpose of performing the contract. That does not make them alterations of the contract. It is true that the terms of repayment involve an alteration in the deductions agreed in the contract, the terms of which are altered in this respect ; and the proviso would prevent the guarantors from relying on any such alteration. But this is a form of repayment, the opportunity for which is long past ; and, in my opinion, has no effect in altering the primary obligation which arises out of an independent contract which the guarantors never undertook should be performed. Similarly, as between the contractors and the Dock Board, the contractors agreed that the ultimate balance of the loans should be included in the cost of completing the work and so in the certificate to be given on that footing by the engineer. In my opinion, the guarantors are no more affected

by this than they would be if the parties had entered into another and additional construction contract elsewhere, and agreed that the liabilities under both should be pooled and expressed in one certificate under the first contract. I think that the guarantors never came under any obligation in respect of the new and uncontemplated burden of loans for £45,000, and are not liable for any sum in respect of such sums or interest. I should mention one further contention which assumes that the loans are outside the contract. It is said that even if that be so the engineer purported to certify under the contract under clause 86 (*b*), and that the contractors and therefore the guarantors must accept the certificate as final even if it included mistakenly items which were not due under the contract. They cited cases where the architect had included in his final certificate sums in respect of extras which had not been ordered in writing in conformity with the contract. *Goodyear* v. *Weymouth and Melcombe Regis Corporation* (3), *Laidlaw* v. *Hastings Pier Co.* (4), *Lapthorne* v. *St. Aubyn* (5). Those cases which turn upon the extent to which the parties had entrusted the architect with determining the sums due under the contract, including extras contemplated by the contract, seem to me to have no bearing upon a case where the architect has intentionally included sums which, as I have said, never were nor were contemplated to be within the original contract, and over which he only derived certifying authority, if any, from a new and independent contract.

The result is that the only evidence of default by the contractors under the original contract is the non-payment of a certificate which, if binding upon the contractors at all, is only binding by reason of the additional and independent loan contract, and is not binding at all upon the guarantors, for it includes sums to an unknown amount which are not due on the original contract. Whether the certificate is sufficient to establish a breach of the condition of the bond by the contractors it is not necessary to determine. The plaintiffs, having assigned a breach, have to prove the damages that flow from it. If the certificate had been unimpeachable, no question would arise as to the defendant's liability for £50,000. So if it were severable and proof were given of a certificate valid as to an amount due under the original contract. But no such evidence was given in the present case. The amount of the balance of loans and interest may reduce the defendants' liability to less than £50,000; and in the absence of any evidence as to what the true amount of the liability is the case against them fails, and they are entitled to judgment.

There can be no doubt, however, that the main contest in this case upon which no doubt the bulk of the costs has been incurred was upon the issue of non-disclosure upon which the defendants fail.

I think that as the judgment of the trial Judge would have to be extensively altered, the better course would be to order that the appeal

be allowed and that the order dated Jan. 11, 1934, and the orders of the Court of Appeal of Dec. 3, 1934, be set aside and that judgment be entered for the defendants on the claim with costs in this House and in the courts below ; and for the plaintiffs on the counter-claim with costs ; the defendants to have no costs of the issues raised by paras. 5 to 7 of the defence ; the plaintiffs to have their costs of such issues in the action and on appeal to the Court of Appeal and this House ; with a set-off.

LORD RUSSELL OF KILLOWEN : My Lords, I am authorised by my noble and learned friend, LORD THANKERTON, to say that he concurs in the opinion of my noble and learned friend, LORD ATKIN, which I have just read. For myself, I also concur therein, and have nothing to add.

LORD MACMILLAN : My Lords, I have had the advantage of considering in print the opinion of my noble and learned friend, LORD ATKIN, which has just been read, and I find myself in entire agreement with it in every respect.

LORD ROCHE : My Lords, I concur. On the main point I agree so entirely with the reasoning of my noble and learned friend, LORD ATKIN, that I have nothing to add save that I should like to be permitted also to express my admiration for the masterly treatment of this complicated case to be found in the judgment of the late SCRUTTON, L.J.

On the point of the scope of the guarantee sued upon and the sufficiency of the evidence to support the present action, the contention of the plaintiffs which was dealt with as their third contention by my noble and learned friend, LORD ATKIN, has given me much anxiety. There seems to me to be considerable force in the contention that the loan agreements were not more than alterations of the original contract as in effect providing for payment of the contract price *pro tanto* in advance of work to be done in place of payment on the basis of actual progress made with the work. But in the light of the opinions to the contrary expressed by your Lordships, I am unable to say that I am satisfied with the correctness of this view of the position, and I therefore concur in the motion that the appeal should be allowed and judgment in this action should be entered for the defendants. It is no doubt regrettable that, in default of some agreement on the figures between the parties, further litigation to establish the amount of the defendants' liability under the original contract will be necessary ; but at least the parties have the satisfaction of knowing that the main point of controversy between them, that is to say, the disclosure point, has now been finally disposed of.

Appeal allowed.

Solicitors : *Wedlake, Letts & Birds* (for the appellants) ; *Johnson, Weatherall, Sturt & Hardy* (for the respondents).

[*Reported by* GERALD A. ABRAHAMS, ESQ., *Barrister-at-Law.*]

HOOVER, LTD. *v.* AIR-WAY, LTD.

[Chancery Division (Bennett, J.), **March 5, 1936.**]

Trade mark—Infringement—Sale of reconditioned goods—Trade Marks Act, **1905 (c. 15), *s.* 39.**

The defendants had reconditioned vacuum cleaners of the plaintiffs' manufacture and had included in the reconditioned article certain parts not of the plaintiffs' manufacture :—

Held : the plaintiffs were entitled to an interlocutory injunction on the ground that this was an infringement of their trade mark.

[EDITORIAL NOTE. So far as the facts are available on an interlocutory proceeding, it would seem that in the present case, the articles were sold as reconditioned and not as new articles. The matter is, therefore, distinguishable from *Gillette Safety Razor Co. and Gillette Safety Razor, Ltd.* v. *Franks* (1924), 40 T.L.R. 606 ; 43 Digest 315, *1367*, and *Spalding* (*A. G.*) *& Bros.* v. *Gamage* (*A. W.*), *Ltd.* (1918), 35 R.P.C. 101 ; 43 Digest 314, *1365*. The practice of selling such reconditioned goods is so widespread at the present time and has hitherto been unchallenged, that this short account of the interlocutory proceedings is here included.

For Infringement of Trade Marks, see HALSBURY, Vol. 27, "Trade Marks," pp. 710, 711, paras. 1281, 1282 ; and for the Cases, see DIGEST, Vol. 43, pp. 215-224, Nos. 595-685.]

Cases referred to :

(1) *Westley, Richards & Co.* v. *Perkes* (1893), 10 R.P.C. 181, 382 : 36 Digest 596, *583*.

(2) *Irving's Yeast Vite, Ltd.* v. *Horsenail* (1934), 103 L.J. Ch. 106 ; Digest Supp.

Motion for an interlocutory injunction to restrain the defendants from infringing the plaintiffs' trade mark Hoover, and from selling, or offering for sale or advertising for sale as "Hoovers," suction-cleaning machines containing component parts other than those of plaintiffs' manufacture.

J. Whitehead, K.C. and *R. E. Burrell* for the plaintiffs : The action is in respect of infringement of a trade mark and for passing off. It is calculated to deceive, but infringement does not depend upon that. Our complaint is that the machine had been altered and the matter should be dealt with by seeing if the question, "Is this a Hoover machine ?" is answered, aye or no. The answer is clearly in the negative. [He referred to *Westley, Richards & Co.* v. *Perkes* (1).]

Trevor Watson, K.C., and *James Mould* for the defendants : The defendants are willing to give an undertaking not to use bags not made by Hoover. The plaintiffs' case must rest upon the alleged infringement. For years it has been possible to buy on the market machines described as reconstructed, and to say that these are infringements of trade marks seems astonishing. Whether a machine sold by the defendants is a Hoover machine is a question of fact. The machine remains a machine operating in the Hoover manner and the alterations made leave it a

Hoover machine in all essential respects. The mere replacement of portions which wear out does not in general alter the character of the goods. [He referred to *Irving's Yeast Vite, Ltd.* v. *Horsenail* (2).]

BENNETT, J.: This is a motion by Hoover, Ltd., first of all, for an injunction to restrain the infringement of the plaintiffs' trade mark Hoover, registered under No. 430787, in class 6, and to restrain the defendants from passing off as Hoovers reconditioned suction-cleaning machines which are not of their manufacture and from offering for sale and from advertising for sale, as being Hoovers, suction-cleaning machines containing component parts other than those of the plaintiffs' manufacture, or from passing off as the plaintiffs', suction-cleaning machines of a different model.

It is to be remembered that this is an application for interlocutory relief only. It is not an application with regard to which the rights of the parties are going to be finally decided. They are to be finally decided in the action which will be tried. I do not intend to go into the question of the passing off of goods which are not of the plaintiffs' manufacture. I do propose to grant the plaintiffs relief in respect of the infringement of their registered trade mark. It seems to me that the balance of evidence lies in granting the plaintiffs that relief until the action is tried.

The plaintiffs are registered as the proprietors of a trade mark with the name Hoover in respect of suction-cleaning machines and parts of such machines, and the term suction-cleaning machines including parts of such machines is held in this connection to cover the parts of such machines. The defendants have sold a reconditioned machine. That machine had on it, at the time when the defendants sold it, the plaintiffs' registered trade mark, regarding that as separate from the bag as attached. On the bag, at the time the defendants sold it, was the registered trade mark of the plaintiffs. The bag was not of the plaintiffs' manufacture. There is in the machine a brush-work, the bristles of which carry out the cleaning action and the bristles in the brush are not of the plaintiffs' construction. It also has a motor and the wiring of the motor, or part of the motor, was not of the plaintiffs' manufacture. The plaintiffs' engineer has made an affidavit in which he has said that in designing a suction-cleaning machine, it is essential that such machine, to prove efficient in use, should have all the working parts thereof carefully selected, and this depends upon the co-operation of the several working parts. The most essential parts are the motor which produces the suction, the bag which contains the dust and the bristles of the brush which carry out the cleaning action. He proceeds to give reasons for that. The statements made in that paragraph of his affidavit have not been controverted on behalf of the defendants. The chief engineer of the defendant company agrees, in para. 8 of his affidavit, that the motor, the bag and the brush are indispensable parts of the machine, although,

he says, there are other indispensable parts also. On that state of fact, the law that has to be applied is to be found in the Trade Marks Act, 1905, s. 39. The section provides that the registration of a person as the proprietor of a trade mark shall give such person the exclusive right to the use of such trade mark upon or in connection with the goods in respect of which it is registered. It seems to me that upon the facts proved here, namely, the sale by the defendants of the article, which has upon it the plaintiffs' trade mark, in which there are three essential parts not of the plaintiffs' manufacture, is *prima facie* a violation of the exclusive right the section gives to the plaintiffs as the registered proprietors of the trade mark.

For these reasons and having in mind that this is an interlocutory proceeding and at the trial facts may be proved which will enable a different view to be taken of the defendants' conduct, I propose to grant an injunction in the terms of para (*a*) of the plaintiffs' notice of motion to be an injunction in the action until further order and to make the costs of the motion, costs in the action.

Solicitors : *Bristows, Cooke and Carpmael* (for the plaintiffs) ; *Stibbard, Gibson & Co.* (for the defendants).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

LOUGHNAN *v.* MARSTON'S DOLPHIN BREWERY, LTD. (IN LIQUIDATION).
WHELAN *v.* ALFRED LENEY AND COMPANY, LTD.

[House of Lords (Lord Hailsham, C., Lord Blanesburgh, Lord Russell of Killowen, Lord Macmillan, Lord Roche), **January 31, February 3 and March 9, 1936.**]

Income Tax—Lease of "tied" licensed premises—Rent received by lessors in excess of Sched. A assessment—Profit under Sched. D—Income Tax Act, 1918 (*c.* 40), *Scheds. A and D.*

A brewery company, intending to close down its brewery in Dec., 1926, and holding a number of freehold and leasehold properties (the majority being licensed premises let to tied tenants), in Oct., 1926, entered into an informal agreement with another brewery company to grant them leases of all the freehold and leasehold properties, including plant and fixtures, for a term of 36 years from Oct. 1, 1926, at a rent equal to the average net profits for the preceding three years. In due course formal leases were granted. The premises were assessed to income tax under Sched. A. In addition the lessors were assessed under Sched. D in respect of profit consisting of the balance of rent received by them in excess of the amount of the assessment under Sched. A, as representing a profit excluded from consideration in assessment under that Schedule :—

Held : the rent paid by the lessees to the lessors was fully assessed under Sched. A, and could not in part be also assessed under Sched. D. The covenant imposing the tie not being enforceable apart from ownership of the land, there was nothing that could be assessed separately from the land.

[**EDITORIAL NOTE.** The point in this case is that a large difference between the rent paid for premises and the Schedule A assessment is not necessarily evidence that the payment called rent includes a payment for services or for some benefit other than the occupation of the land. The case is a strong one for the rent was almost four times the assessment under Schedule A, and yet it was held that the only tax chargeable was that under Schedule A. To make a further charge it is necessary to show something of value to which further income can be ascribed and which can be separated from the ownership of the land. In the present case this was said to be the "tie," but that was said to be worth nothing as the lease was determinable at three months' notice and, moreover, could not be enforced by any person not the owner of the land. The claim to tax the difference between the rent and the Schedule A assessment therefore failed.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 17, p. 35, para. 62, and FOR THE CASES, see DIGEST Supp., Income Tax, cases Nos. 116 (*a*), 116 (*f*).]

Cases referred to :

(1) *Fry* v. *Salisbury House Estate, Ltd.*, *Jones* v. *City of London Real Property Co., Ltd.*, [1930] A.C. 432 ; Digest Supp.

(2) *Coman* v. *Rotunda Hospital, Dublin (Governors)*, [1921] 1 A.C. 1 ; 28 Digest 82, *462.*

(3) *Campbell* v. *Inland Revenue* (1879), 1 Tax. Cas. 234 ; 28 Digest, 7 (*1*).

APPEAL from an order of the Court of Appeal allowing an appeal by Alfred Leney & Co., Ltd., from the decision of FINLAY, J., upon a case stated by the Special Commissioners for the purposes of the Income Tax Acts. The points raised in both appeals were similar.

The question was whether the difference between the amount of certain rents received by the lessors (the respondent company) and the amount of the Sched. A assessment, was chargeable to tax under Sched. D of the Income Tax Act, 1918. The average of the rents received from Oct., 1926, onwards was about £20,000 per annum, while the average of the net Sched. A assessments was about £5,500 per annum. The rents were payable by the lessees to the lessors in respect of a number of freehold and leasehold properties (the majority of which were licensed houses and let to tied tenants) demised to the lessees in accordance with a prior informal agreement between the lessors and lessees dated Oct. 18, 1926, for a term of 36 years from Oct. 1, 1926, at a rent equivalent to the average net profits of the lessors for the three years ending Sept. 30, 1926. The lessors, who had retired from business in Dec., 1926, appealed against assessments under Sched. D claiming that all rents received by them from the lessees were fully and exhaustively assessed under Sched. A. The Special Commissioners decided to maintain the assessments under Sched. D on the ground that, as the benefit of the tying covenants was transferred to the lessees, the rents received by the lessors contained an element of profit excluded from consideration for the purposes of taxation under Sched. A, but chargeable to income tax under Sched. D. They reduced the assessments to figures which

were agreed on the basis of this decision. From the decision of the Commissioners the lessors appealed by way of case stated, under the Income Tax Act, 1918, s. 149, which was heard before Finlay, J., who dismissed the appeal. On an appeal by the lessors to the Court of Appeal, Lord Hanworth, M.R., and Slesser and Romer, L.JJ., allowed the appeal and reversed the decision of Finlay, J., and of the Special Commissioners. Thereupon this appeal was brought.

The facts and arguments are fully referred to in the judgment.

The Solicitor-General (*Sir Donald B. Somervell, K.C.*), and *Reginald Hills* for the appellant.

A. M. Latter, K.C., and *Cyril L. King* for the respondents.

Lord Russell of Killowen: My Lords, it will be convenient to deal first with the appeal which relates to the assessment of Alfred Leney & Co., Ltd., to whom I will refer as Leneys. The matter for decision is whether Leneys are assessable to income tax under Sched. D of the Income Tax Act, 1918, in respect of the amount by which the aggregate rents payable to them under leases of premises demised by them exceed the amounts of the aggregate annual values of the same premises as assessed to tax under Sched. A. The Commissioners having assessed Leneys under Sched. D, their assessment was confirmed by the Special Commissioners whose determination was affirmed by Finlay, J. An appeal from his order was allowed, and the determination of the Special Commissioners was reversed by the Court of Appeal. Hence the appeal to your Lordships' House.

I need not recapitulate the facts in any great detail. Leneys were brewers with a brewery at Dover. They owned a number of freehold and leasehold properties, the majority of which were licensed houses, let to tied tenants. I will refer later to the nature of these tied tenancies. In the year 1926 they were minded to retire, at any rate, for a time, from the business of brewing, and on Oct. 18, 1926, they entered into an informal agreement with a company called Fremlin Brothers, Ltd., who also were brewers, under which Fremlin Brothers, Ltd., were to take a lease of all Leneys' freehold and leasehold properties, including plant and fixtures (except their mineral water and cordial factories and buildings), for a term of 36 years from Oct. 1, 1926, at a rent equivalent to the average net profits of Leneys for the three years ending Sept. 30, 1926, subject, however, to modification and to reductions as therein mentioned. It is unnecessary to consider this agreement in further detail. It was superseded by four formal agreements for leases each dated June 21, 1928, one covering the unencumbered freeholds and long leaseholds, a second covering the encumbered freehold and long leaseholds, a third covering the unemcumbered short leaseholds and a fourth covering the encumbered short leaseholds. These agreements, it will be noticed, are some 20 months later in date; but ever since the execution

of the informal agreement, Fremlin Brothers, Ltd., had supplied beer to the tied tenants, Leneys' brewery having been closed down in Dec., 1926.

The rents had been calculated and ascertained in respect of each of the four blocks of properties respectively comprised in the four formal agreements, and the appropriate sum for rent so ascertained was inserted in the form of lease which was scheduled to each of those agreements.

The leases which were in fact granted in pursuance of those agreements, were not granted to Fremlin Brothers, Ltd., but to assignees of their assets and business, viz., another limited company called Fremlins, Ltd. Nothing however turns upon that, or upon the fact that the properties were divided into four blocks. The total aggregate of the rents received under the four leases over a period of five years averaged approximately £20,000. The aggregate of the annual values of the properties comprised in the four leases (arrived at by adding together all the individual Sched. A assessments) averaged over the same period about £5,500.

Assessments to income tax were made upon Leneys under Sched. D in respect of the amount by which the payments received by them under the leases exceeded the aggregate annual values as appearing in the Sched. A assessment. On appeal to the Special Commissioners, they held that the assessments should be confirmed on the grounds (stated shortly) that the benefit of the tying covenants had been transferred to the lessees, that the transfer of this trading connection with the tied tenants was the primary object of the arrangement, that the profits which a brewer could make by the use of the premises as tied houses, and the enhanced rent he would be prepared to give to secure those profits, were not and could not be reflected in the Sched. A assessments, that therefore the payments received by Leneys under the leases included an element not included for purposes of taxation under Sched. A, and that therefore that element was a profit chargeable to tax under Sched. D.

On request they stated a case which came on for hearing before FINLAY, J., who affirmed their decision.

The learned Judge said that two distinct things were sold, viz., (1) the reversions and (2) the right to supply liquor to the tied houses: that the second was property outside the ambit of the Sched. A assessment; that while Leneys received something as landlords, they received also what was really a trade receipt as brewers. The learned Judge did not in terms say how much was received in each capacity, but since he affirmed the determination of the Special Commissioners it must be presumed that the receipt as landlords was so much of the rent reserved by a lease as was equivalent to the aggregate of the individual Sched. A assessments of the properties thereby demised.

An appeal to the Court of Appeal resulted in a reversal of the deter-

mination of the Special Commissioners and an order for repayment of the tax paid with interest. In the opinion of the Court of Appeal the rents payable were payable for the hereditaments demised and for nothing else and that consequently no assessment to tax under Sched. D was permissible.

My Lords, I entertain no doubt that the decision of the Court of Appeal was correct.

The Crown's case is that the rent is not paid for the land alone, but is paid partly for the ties affecting the licensed houses as matters which could be separated from the property in the land, i.e., from the ownership of the reversion expectant on the determination of the tenants' interest. This portion of the rent is, they say, a profit or gain which does not arise from property in land assessable under Sched. A, but is a profit or gain assessable under Sched. D.

In my opinion this contention is wrong from start to finish. Let me call attention (taking it merely as a sample) to the lease of Leneys' unencumbered short leaseholds, and to the sample tenancy agreement which was put in evidence. The lease is a sublease for the terms held by Leneys less three days, at a yearly rent of £938 14*s.* 8*d.*, the parcels, so far as relevant to this appeal, being thus described :—" All the land and premises specified in the schedule hereto and the appurtenances thereof and the fixtures thereon subject to and with the benefit of the existing tenancies thereof." The description might have stopped with the word " hereto " ; all that follows above merely describes consequences necessarily involved in the demise of the land. The lease contains a clause providing that if a house is sold or ceases to be licensed the proceeds of sale or compensation money shall if possible be applied in purchasing other licensed property which is to be deemed included in the schedule and is to be demised without alteration of the rent.

Now consider the sample tenancy subject to which the lessee, under this lease, will hold the land thereby demised. Its duration is " until the tenancy shall be determined in any manner hereinafter mentioned," and clause 4 enables either party to determine it on three calendar months' notice in writing to expire on any day, except that the tenant cannot determine before one year from the commencement of the tenancy. The covenant tying the tenant so far as material runs thus :

> To purchase from the landlords or their nominee or nominees and from no other company or companies person or persons all ale beer stout porter and other malt liquors and wines and spirits whether in cask or bottle and mineral waters which may be received vended or consumed upon or out of the said premises during the tenancy at the prices set out in the schedule hereto so far as the same are so set out and if where not set out then at the landlord's usual list prices for tied houses for the time being and not during the said tenancy either directly or indirectly to buy receive sell or dispose of in upon out of or about the said house and premises or any part thereof or suffer to be brought thereon any ale beer stout porter or other

malt liquor or wines and spirits either in cask or bottle or any mineral water except such as shall have been so purchased of the landlords or their nominee or nominees.

The word "landlords" includes the successors in title of the landlords and the word "tenant" includes the executors, administrators and assigns of the tenant. It would seem reasonably clear that the benefit of the tie and the reversion could not be disposed of separately. The landlord owning the reversion might name a nominee, and as long as he remained landlord he could enforce the covenant for the nominee's benefit; the nominee could not. But the moment the landlord sold the reversion the nominee would cease to be the landlord's nominee, and a refusal by the tenant to take liquor from a person who was neither the new landlord nor the new landlord's nominee would be no breach of the covenant. There is accordingly, in my opinion, nothing here which can be separated from the ownership of the land.

Now consider the value to the lessees of that tie for which the Crown contends that Fremlins are paying large sums as a matter apart from the land demised to them. It is worth nothing. It is at most a three months' tie, for the tenant can determine the tenancy on three months' notice. A new tie would have to be imposed on the new tenant. In these circumstances it seems to me impossible to say that anything is paid for the tie. The rent is paid for the land, the ownership of which carries with it the power to impose a tie if the existing tenancy determines and (by abstaining from determining a tenancy) to retain a tie if the sitting tenant is willing to remain. The lessee pays a rent in excess of the aggregate annual values assessed under Sched. A because of the profitable use which he, the lessee (in the light, if you will, of Leneys' experience), hopes to make of the land; and that rent is received by Leneys in respect of their property in land, and in respect of nothing else.

If that be so, then the case is concluded by the decision of this House in *Fry* v. *Salisbury House Estate, Ltd.* (1). When once profits and gains arising from property in land have been charged to income tax under Sched. A, no further income tax can be charged in respect of those profits and gains. If, however, the owner of the land carried on upon the land some activities, which result in profits and gains arising, not from property in the land, but from the owners user thereof, those profits and gains may be chargeable to income tax. Instances of such user and chargeability will be found in the *Salisbury House* case (1), and in the *Rotunda* case (2). In the present case, however, Leneys carry on no activities on the land; they are not in possession; they do nothing but receive the rents as owners of the reversions expectant on the determination of the four leases to Fremlins.

I am of opinion that the appeal in the case of Leneys fails, and should be dismissed with costs.

In the case of Marston's Dolphin Brewery, Ltd., the facts are a little different, but the result must be the same.

In that case there was only one lease, for 35 years, at a single rent of £20,000. The parcels demised ran thus:

All and singular the lands, buildings and hereditaments respectively described and specified in the schedule hereto, together with the goodwill of the businesses carried on thereon respectively and the licences connected therewith and the benefit of all covenants in restraint of trade, trading and other covenants to the benefit of which the company is entitled in connection with all or any of the premises. And together with the right to sign the name of the company in requiring the tenants of the premises to deal exclusively with the lessee as the nominee (as it is hereby appointed) of the company for all ale, beer, porter, stout and malt liquors, cider, perry, wines, spirits, mineral waters and other goods in accordance with the terms of the holdings of the said tenants as tenants of the company's premises together also with the right to use in connection therewith all trade marks trade labels and advertisements used by the company in connection with the said business.

From this it is apparent that the rent was reserved in respect of some matters other than the land. The Commissioners apportioned out of the rent of £20,000, £100 to the free trade of the brewery and £100 to the goodwill of the mineral water business. Where a single rent is reserved in respect of several subject matters, some of which do not represent property in land, such apportionment is right and proper: *Campbell* v. *Inland Revenue* (3). Ultimately the Commissioners fixed the sum of £15,000 as being the portion "attributable to subject matters of the lease other than corporeal hereditaments." The Court of Appeal by their order reversed this decision, and remitted the case to the Commissioners for them to reconsider their decision in the light of the decision of the Court of Appeal in Leneys' case, and to decide whether there was any and what part of the £20,000 attributable to subjects included in the lease other than corporeal hereditaments, with a particular reference to personal goodwill, and the user of trade marks, trade labels and advertisements. It was intimated to us that the parties would probably be able to come to an agreement without any reconsideration by the Commissioners; but in any event the order of the Court of Appeal must stand, and the appeal therefrom should be dismissed with costs.

My Lords, I am authorised by my noble and learned friends, the Lord Chancellor and Lord Blanesburgh to state that they concur in the opinion which I have just delivered.

Lord Macmillan: My Lords, I concur.

Lord Roche: My Lords, I also concur.

Appeals dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Godden, Holme & Ward* (for the respondents).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

McCANN *v.* SCOTTISH CO-OPERATIVE LAUNDRY ASSOCIATION LIMITED.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Roche), **January 20, 23, and March 3, 1936.**]

Workmen's Compensation—Partial incapacity—Light work provided by employer at pre-accident wage—Subsequent total incapacity through illness unconnected with accident—Compensation during illness—Workmen's Compensation Act, 1925 (c. 84) *ss.* 1 (1), 9 (1), (3).

By accident arising out of and in course of her employment a female worker sustained permanent injury to her right hand, and for a period received compensation as for total incapacity. Having become fit for special light work, her employers gave her such work at her full pre-accident wage. While so employed she was rendered temporarily unfit for any work through serious illness unconnected with the injury due to the accident. The light work provided by her employers remained open to her during the whole period of her illness. An arbitrator awarded her compensation as for partial incapacity for this period :—

HELD : the arbitrator rightly awarded compensation for the period in question and the liability of the employers to the worker for compensation was not satisfied by their offer of light work, which her illness prevented the worker from accepting.

[**EDITORIAL NOTE.** The existence of injury due to an accident arising out of and in the course of the employment is the sole criterion whether compensation is payable or not. There are many cases where illness supervenes upon the accident and if the illness is not the result of the accident or the injury caused thereby, the employee is still entitled to compensation so long as there is incapacity due to the accident. The last stage is reached when the employee is totally incapacitated by illness not resulting from the accident, but even in that case if there is still any incapacity due to the accident, the employee may still recover compensation, and this is so even though there is an offer of light work which the employee by reason of such illness must refuse.

FOR THE LAW UPON SUPERVENING ILLNESS IN WORKMEN'S COMPENSATION CASES, see HALSBURY, 1st Edn., Vol. 20, p. 233, para. 549 and Supp., and FOR THE CASES, see DIGEST, Vol. 34, pp. 345, 346, Nos. 2782-2793.

Cases referred to :

(1) *Ball* v. *Hunt (William) & Sons, Ltd.*, [1912] A.C. 496 ; 34 Digest 395, *3228*.
(2) *Lysons* v. *Knowles (Andrew) & Sons, Ltd.*, *Stuart* v. *Nixon & Bruce*, [1901] A.C. 79 ; 34 Digest 423, *3433*.
(3) *Chandler* v. *Smith*, [1899] 2 Q.B. 506 ; 34 Digest 436, *3556*.
(4) *Jamieson* v. *Fife Coal Co.* (1903), 5 F. (Ct. of Sess.) 958 ; 34 Digest 414, Case (*d*).
(5) *Cory Bros. & Co., Ltd.* v. *Hughes*, [1911] 2 K.B. 738 ; 34 Digest 408, *3321*.
(6) *Harwood* v. *Wyken Colliery Co.*, [1913] 2 K.B. 158 ; 34 Digest 348, *2803*.
(7) *McNally* v. *Furness, Withy & Co., Ltd.*, [1913] 3 K.B. 605 ; 34 Digest 352 ; *2839*.
(8) *Stowell* v. *Ellerman Lines, Ltd.* (1923), 16 B.W.C.C. 46 ; 34 Digest 345, *2787*.
(9) *Cargo Fleet Iron Co., Ltd.* v. *Funck* (1916), 9 B.W.C.C. 318 ; 34 Digest 352, *2840*.
(10) *Hamilton* v. *Shelton Iron, Steel & Coal Co., Ltd.* ; *Leigh* v. *Shelton Iron, Steel & Coal Co., Ltd.* ; *Timmis* v. *Shelton Iron, Steel & Coal Co., Ltd.* (1926), **19 B.W.C.C. 475 ; 34 Digest 397, *3239*.**

(11) *Bromley* v. *Staveley Coal & Iron Co., Ltd.*; *Drew* v. *Staveley Coal & Iron Co., Ltd.* (1923), 16 B.W.C.C. 77; 34 Digest 396, *3238*.

Appeal from a judgment of the First Division of the Court of Session.

On Dec. 11, 1930, the appellant, Margaret McCann, while in the employment of the respondents, sustained personal injury by an accident with the result that she lost her right index finger, and her right thumb became stiff and shrivelled. Her average weekly earnings prior to the accident were 28*s*., and the respondents paid her compensation as for total incapacity at the rate of 19*s*. 5*d*. per week until Feb. 23, 1932, on which date she became fit for light work of a special character. The respondents provided her with such work at her former wage of 28*s*. per week till Nov. 14, 1932, when she contracted appendicitis and became seriously ill and unfit for any work till May 31, 1933. During the whole period from Nov. 14, 1932, till May 31, 1933, the special light work was made available to the appellant by the respondents at the same wage, and she would have been engaged therein but for her illness unconnected with the accident. Throughout the period of her illness she continued to suffer from partial incapacity of a permanent character in consequence of the accident at work. On these facts the arbitrator, under the Workmen's Compensation Act, 1925, found that the present appellant was entitled to compensation for partial incapacity at the rate of 9*s*. 6*d*. per week for the period from Nov. 14, 1932, till May 31, 1933. The employers (the present respondents) appealed by case stated to the First Division of the Court of Session who (the Lord President, Lord Blackburn, Lord Fleming; Lord Morison dissenting) reversed the decision of the arbitrator, and sustained the appeal of the employers on the ground that the worker's inability to earn her pre-accident wage during her illness was not attributable to her partial incapacity but to a cause unconnected with the accident. Thereupon this appeal was brought.

The arguments are fully referred to in the judgments.

T. D. King Murray, *K.C.*, and *Thomas J. D. Connolly* for the appellant.

Arthur P. Duffes, *K.C.*, *J. L. Clyde*, and *John Thompson* for the respondents.

Lord Russell of Killowen: My Lords, the opinion which I am about to read has been prepared by my noble and learned friend, Lord Thankerton. Agreeing as I do with it, and also with the opinion about to be delivered by my noble and learned friend, Lord Macmillan, I have only to say that I agree with both, and have nothing to add.

Lord Thankerton [read by Lord Russell of Killowen]: My Lords, On Dec. 11, 1930, the appellant, while in the employment of the respondents, sustained severe injuries in an accident, from which she is still suffering. The present appeal arises out of an award by the arbitrator of a weekly payment of 9*s*. 6*d*. in name of compensation as for

partial incapacity for the period from Nov. 14, 1932, till May 31, 1933, during which, apart from any injuries due to the accident, the appellant was in fact rendered unfit for any work by an illness in no way connected with the accident. On the case stated by the arbitrator, his decision has been reversed by the First Division of the Court of Session, LORD MORISON dissenting.

It is established that the injuries were caused to the appellant by accident arising out of and in course of her employment, and the respondents paid compensation to the appellant as for total incapacity at the rate of 19*s.* 5*d.* per week up to Feb. 23, 1932, at which date the appellant had become fit for light work, though only of a special character, and the respondents supplied her with such work, paying her 28*s.* per week, which was her average weekly wage prior to the accident. The appellant continued at such work until Nov. 14, 1932, at which point I will turn to the arbitrator's findings of fact, Nos. 7 to 12, which are as follows :

7. That at the last-mentioned date (Nov. 14, 1932), the claimant became seriously indisposed and unfit for any work, and that this unfitness continued till some short time before the date of the proof (June 30, 1933) ;

8. That the said indisposition was primarily attributable to a chronically-inflamed appendix, which was removed by operation, and that the said indisposition was in no way connected with the injury due to the accident ;

9. That during the whole of the period from Nov. 14, 1932, till the date of the proof the said light work was open to the claimant on the same terms, and that she would have been engaged therein but for said indisposition ;

10. That the claimant has now recovered from said indisposition so as to be fit for the said employment, which is still open to her on the same terms ;

11. That over and above the permanent injury sustained by her in the loss of her finger the claimant still suffers from weakness and loss of flexibility in the thumb of her right hand, which is probably permanent and also from some weakness in her right arm ; and

12. That the claimant has thus continuously since Nov. 14, 1932, been and still is partially incapacitated as a result of the accident.

On the facts found by him, the arbitrator awarded to the appellant the sum of 9*s.* 6*d.* weekly in name of compensation as for partial incapacity for the period from Nov. 14, 1932, till May 31, 1933 (which was accepted by agreement of parties as the date of termination of the indisposition), from which date he ended payment of compensation until the further orders of the court, as the appellant had resumed her light work with the respondents.

At the request of the respondents, the arbitrator stated a case for the opinion of the Court of Session. Parties were agreed that your Lordships need only consider the first three questions of law in the stated case, which are as follows :

1. On the facts founds was any liability of the respondents to the claimant for compensation during the period from Nov. 14, 1932, to May 31, 1933, satisfied by their offer of light work ?

2. On the facts found above was the claimant entitled to compensation during the period from Nov. 14, 1932, to May 31, 1933 ?

3. On the facts proved, was I entitled to award compensation as for partial incapacity for the period from Nov. 14, 1932, to May 31, 1933 ?

The First Division of the Court of Session has answered the first question in the affirmative, and the second and third questions in the negative, thus reversing the decision of the arbitrator, which the appellant now seeks to have restored.

My Lords, it seems to me that the learned Judges who formed the majority in the Court of Session have fallen into an error similar to that of the Court of Appeal in the well-known case of *Ball* v. *William Hunt & Sons* (1), and I may be pardoned in recalling the observations of Lord Macnaghten in that case (page 500), where he said :

> Now "incapacity for work" as the phrase is used in the schedule seems to me to be a compendious expression meaning inability to earn wages or full wages as the case may be at the work in which the injured workman was employed at the time of the accident. But whether that be so or not, it is laid down most distinctly in this House (*Lysons* v. *Andrew Knowles & Sons, Ltd.* (2)), that you must not resort to the schedule for the purpose of cutting down the right to compensation. The right to compensation is given by the Act. The Act is the workman's charter. The schedule prescribes the scale of compensation and the mode and conditions of its enjoyment. That is the office of the schedule. The key to the meaning of the Legislature is not to be looked for there.

The transference of the provisions of the first schedule of the Act of 1906, to which Lord Macnaghten referred, into the body of the Act of 1923, and of the Act of 1925, where they are found in sects. 8 and 9, does not alter the validity of these observations.

On the facts here found, it is clear, in my opinion, (*a*) that the appellant acquired a right to compensation in respect of the personal injury caused by the accident, which at first incapacitated her wholly from doing the work at which she was employed at the time of the accident, (*b*) that such injury has throughout subsisted, and still subsists, and (*c*) that she has therefore had throughout, and still has, a right to compensation, the amount of such compensation to be measured by the provisions of sect. 9.

During the period of total incapacity up to Feb. 23, 1932, the appellant's right to compensation was satisfied by the payments made to her by the respondents. During the first period of partial incapacity up to Nov. 14, 1932, the appellant's right to compensation was similarly satisfied by the 28*s*. paid in respect of her light work. I pause here to observe that the payment of 28*s*. per week for the light work was evidence, which your Lordships are entitled to assume to have been taken into account by the arbitrator in assessing the amount of 9*s*. 6*d*. per week as for partial incapacity during the following period, and that your Lordships are therefore entitled to infer that some portion of the 28*s*. so paid by

the respondents satisfied a claim which the appellant might otherwise have made in respect of her partial incapacity.

Then comes the crucial period from Nov. 14, 1932, to May 31, 1933: In my opinion, the appellant's right to compensation in respect of her partial incapacity clearly continued during this period, and the only question is whether she is entitled to payment of compensation. I am unable to conceive that the fact that she suffered from an indisposition unconnected with the accident, which prevented her working, can *per se* disentitle her to compensation, and I did not understand that any such contention was put forward. The question is whether this fact, along with the continuous offer of work at 28*s.* per week, which the indisposition alone prevented the appellant from taking, excluded the appellant from obtaining any award of compensation.

My Lords, if a workman is himself to blame for his failure to take work that is offered by the employers that may well preclude him from recovery of compensation, but where, owing to old age or illness unconnected with the accident, he is unable to accept such offer, I am quite unable to hold that his claim to compensation is in any degree satisfied or can be deemed to be satisfied. To hold the workman, under such circumstances, disentitled to an award of compensation is, in my opinion, to cut down his right to compensation, instead of measuring the amount of compensation due. An offer of work by the employers which they know the workman to be unable to accept, is no better than making no offer at all.

The leading opinion in the Court of Session was delivered by LORD PRESIDENT CLYDE, who states:

> The salient fact is that, prior to her indisposition, she had never been entitled to any compensation as for partial incapacity, but on the contrary did actually earn and was actually able to earn, her full pre-accident wage notwithstanding her partial incapacity for work; and the plain fact is that what prevented her from earning, or being able to earn, her pre-accident wage was that, while she was laid aside by indisposition, working and earning were equally beyond her power, by reason of circumstances which had nothing to do with partial incapacity for work attributable to her industrial injuries. . . . I must not be supposed to suggest that if, when she fell ill, she had been in receipt of a weekly payment as for partial incapacity for work, her right to continue to receive that weekly payment would have been in any way affected.

The opinions of LORD BLACKBURN and LORD FLEMING are substantially based on similar reasoning.

As already stated, these opinions do not appear to recognise that the right of the workman to compensation is conferred by the Act, and is not dependent on an award by the arbitrator or any payment of compensation by the employers. This is illustrated by the right of the injured workman to obtain a declaration of liability without even a nominal money award, which was first recognised in *Chandler* v. *Smith* (3), and

which has since been continued in practice. Secondly, these opinions fail to recognise that the difference between total and partial incapacity does not affect the quality of the right to compensation, but merely affects the method of measurement of the amount of the compensation. Lastly, as already indicated, I am of opinion, on the facts stated, and the finding of the arbitrator, that the 28*s*. wage earned by the appellant prior to her indisposition did satisfy a claim for compensation for partial incapacity, otherwise available to the appellant.

There is a long series of decisions which I am unable to distinguish, in principle, from the present one. In *Jamieson* v. *Fife Coal Co., Ltd.* (4), a miner, who had been totally incapacitated by accident, and to whom the employers had voluntarily paid full compensation for two years, reached an age when full wages as a miner could not be earned, whereupon the employers declined to continue these payments at the full rate. The miner applied for an award of compensation, and, in fixing its amount, the arbitrator took into account the incapacity due to advancing age. It was held that the arbitrator, in fixing the weekly payment, was not entitled to reduce its amount on account of the decreasing working capacity due to advancing years. In *Cory Brothers & Co., Limited* v. *Hughes* (5), a collier, by agreement with his employers, received compensation for two years in respect of an accident which resulted in an injury to his hand, after which he was provided with light work at the colliery at his old wages. Nearly two years later he was compelled to give up the light work owing to heart disease, which was held to be unconnected with the accident, and he then registered a memorandum of the original verbal agreement to pay compensation. The employers immediately applied for termination of the weekly payments under the agreement on the ground that his incapacity to earn wages was due to the heart disease, but this contention was rejected both by the County Court Judge and the Court of Appeal. In *Harwood* v. *Wyken Colliery Company* (6), the County Court Judge rejected a claim for compensation by an injured workman, as to whom he found that he was incapable of doing any but light work owing to the accident, and that he was also incapable of doing any but light work in consequence of heart disease, and that, if there had been no accident at all, he would still be incapacitated for work as a miner or banksman; on appeal, this decision was reversed. Lord Sumner, then Hamilton, L.J., says (p. 169):

> In my opinion the workman did bring himself within the Act, and he is not disentitled to be paid compensation by reason of the supervention of a disease of the heart. It cannot be said of him that partial incapacity for work has not resulted and is not still resulting from the injury. All that can be said is that such partial incapacity is not still resulting "solely" from the injury. To read the word "solely" into the Act after the word "injury" is not the interpretation but is

legislation, unless the context or the scheme of the Act (natural justice not being in question) demonstrates that the Legislature so intended.

These words are directly applicable in the present case. I will only refer to the case of *McNally* v. *Furness, Withy & Company* (7), in which the workman had been sent to prison, in order to reserve my opinion as to whether the principle of *Harwood's* case (6) was rightly invoked in the circumstances of that case.

But the case in which the facts are most analogous to those in the present case, is *Stowell* v. *Ellerman Lines* (8), which was not cited to your Lordships, and does not appear to have been hitherto referred to. A dock-labourer, in an accident, fractured his left hand, which resulted in stiffness and loss of grip. He was paid full compensation for over a year, and he then returned to his ordinary work, though he had difficulty in doing it, but he worked on for a year, until June, 1922, when he gave up his work. In the previous March he had noticed swelling in his groin and was unable to do his full work because of the pains there. In September, 1922, he instituted proceedings for compensation as for total incapacity. The County Court Judge refused compensation on the ground that he was totally incapacitated for work by the hernia, which was not connected with the accident, and that therefore he need not consider whether there was any partial incapacity due to the accident. The Court of Appeal (LORD STERNDALE, M.R., WARRINGTON and ATKIN, L.JJ.) following the decision in the cases of *MacNally* (7) and *Harwood* (6), sent the case back to the County Court Judge to consider whether the man was partially incapacitated as a result of the accident, and, if so, to award compensation for such period as he thought the partial incapacity continued. The present case appears to lead *a fortiori* to the same result, for it will be noted that the workman Stowell had actually returned to his ordinary work at the ordinary wages.

I may also refer to *Cargo Fleet Iron Company* v. *Funck* (9), where the workman was interned as an alien enemy, and to *Hamilton* v. *Shelton Iron Company* (10), and cognate cases, where a strike had supervened; in these cases compensation was awarded. In another strike case, *Bromley* v. *Staveley Coal & Iron Company* (11), compensation was refused, but, except so far as the decision is based on the workman's refusal to accept work, I do not regard it as satisfactory.

I am therefore of opinion that the arbitrator rightly awarded compensation for the period in question to the appellant, and that the appeal should be allowed with costs as in pauper cases, and that the first question of law in the stated case should be answered in the negative and the second and third question in the affirmative.

LORD MACMILLAN: My Lords, the question in this appeal is whether the appellant is entitled to an award of compensation under the Workmen's Compensation Act, 1925, for the period from Nov. 14, 1932,

to May 31, 1933. The learned arbitrator has found in fact that throughout the whole of this period the appellant was partially incapacitated for work as the result of an accident arising out of and in the course of her employment which befell her on Dec. 11, 1930. *Prima facie*, therefore, the appellant would appear to be entitled to an award of compensation. She received an award at the rate of 9*s*. 6*d*. per week from the learned arbitrator, but on appeal by way of stated case the First Division of the Court of Session by a majority reversed his decision and your Lordships have now to review the matter.

It appears that from the date of her accident up to Feb. 23, 1932, the respondents paid compensation to the appellant as for total incapacity. From Feb. 23, 1932, having by then become fit for light work, she was employed by the respondents at her pre-accident wages till Nov. 14, 1932, when she became unfit for any work in consequence of a serious illness entirely unconnected with her accident or her employment. She consequently remained unemployed and earned no wages from Nov. 14, 1932, till May 31, 1933, when, having recovered from her illness, she again became able for light work.

My Lords, it is now well settled, that a workman who by reason of incapacity due to an accident is entitled to compensation does not lose that right merely because through some extraneous supervening cause, such as illness or old age, a natural incapacity is added to the incapacity due to the accident. The employer cannot plead that as the workman would, by reason of his condition apart from the accident, be incapacitated in any event, he has lost his right to compensation. There is no merger of the accidental incapacity in the natural incapacity. The circumstance accordingly that the appellant's partial incapacity due to her accident was during the period in question combined with total incapacity due to her illness, affords the respondents no answer to her claim to be compensated for her partial incapacity during that period.

But throughout the whole period, as the learned arbitrator has found, the light work upon which the appellant was engaged when she fell ill remained open to her and had she been able to avail herself of this standing offer of work the respondents would have paid her her full pre-accident wages. The First Division of the Court of Session, answering in the affirmative the first question of law appended to the stated case, have held that any liability on the part of the respondents to the appellant for compensation during the period of her illness was satisfied by their offer to her of light work.

My Lords, I share the view, so clearly expressed by Lord Morison, that the statute affords no justification for this decision. It is nowhere enacted that an offer of work is an answer to a claim for compensation for partial incapacity. It is true that if the workman has resumed work after his accident and is in fact earning the same wages as before his

accident, the employer is freed from liability so long as that state of matters continues, even if the workman is still partially incapacitated, but this is because the statutory method of calculating compensation yields nothing. In the present case the appellant throughout the period of her claim was partially incapacitated by accident and was earning nothing. The respondents therefore cannot found upon any actual receipt of wages by her. It is also true that if the employer can prove that the workman is able to earn his full pre-accident wages, though he may not in fact be earning them, this also will preclude an award; and an offer by the employer to engage the workman at his full pre-accident wage is evidence, though not conclusive evidence, that he is able to earn his pre-accident wages. But if he is unable through no fault of his own to accept his employer's offer, how can he be said to be able to earn his pre-accident wages? That is the present case. The appellant during the material period was through no fault of her own neither earning nor able to earn her pre-accident wages and during the whole of that period she was partially incapacitated by reason of the injury by accident which she had sustained. That, in my view, is sufficient to justify an award in her favour and it is nothing to the purpose to say that her inability to earn wages was due to an illness unconnected with her accident.

My Lords, the views which I have expressed are, I think, amply justified by the authorities which my noble and learned friend LORD THANKERTON has fully examined and it would be superfluous on my part to go over them again. I concur with his conclusion.

LORD RUSSELL OF KILLOWEN: My Lords, I am authorised to say that my noble and learned friends, LORD ATKIN and LORD ROCHE, concur in the opinions which have been delivered.

Appeal allowed with costs.

Solicitors: *Herbert Z. Deane & Co.*, for *John Baird*, Edinburgh, and *D. McCraig*, Greenock (for the appellant); *W. Stanley Eastburn*, for *Cairns & Robertson*, S.S.C., Edinburgh, and *Keyden, Strange & Co.*, Glasgow (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

STRANGEWAYS-LESMERE *v.* CLAYTON AND OTHERS.

[King's Bench Division (Horridge, J.), **February 27, 28, March 2 6, 1936.**]

Medicine—Negligence of nurses—Professional duty—Liability of hospital.

Two nurses misread their written instructions and administered to a patient a dose of six ounces of paraldehyde instead of six drachms, with the result that the patient died. On the bottle containing the paraldehyde the ordinary dose was stated to be a half to two drachms by the mouth, and the nurse who administered it stated that she knew that the dose by the rectum would be at the most three times as much. The dose was not checked by the sister in charge or her deputy, though this was the practice in the hospital. No notice to the nurses as to the necessity for such checking was exhibited in the hospital. The husband of the patient sued both the nurses and the Hospital Authorities by whom they were engaged :—

Held : (i) both nurses were negligent.

(ii) the Hospital Authorities had fulfilled their duty in employing duly qualified nurses and were not liable for the negligence of the nurses.

(iii) a hospital authority is not liable for the negligence of a duly qualified nurse when performing a duty in which she is to use professional skill ; but, *semble*, such authority is liable for negligence of such a nurse in the performance of purely ministerial or administrative duties.

(iv) the failure to exhibit the notice as to checking was not a negligent act on the part of the hospital.

(v) the administering of the dose in question was not a mere ministerial act, but one in which the nurse was to use professional skill.

[**EDITORIAL NOTE.** The law has long been settled that hospitals are not liable for the negligence of doctors, so long as they engage properly qualified persons. The position of nurses has not been so clear, but it would now appear that in so far as nurses perform duties requiring professional skill, the liability of the hospital is to be tested upon the same footing as in the case of doctors. The most interesting point in this case is probably the finding that the administering of the dose was not a matter of routine or mere ministerial act, it being remembered that the negligence here lay in the measuring the dose according to written instructions.

For the Law on the Point, see HALSBURY, 1st Edn., Vol. 20, Medicine, p. 334, para. 818, and for the Cases, see DIGEST, Vol. 34, p. 550, Nos. 86, 87 and Supp.]

Cases referred to :

(1) *Hillyer* v. *St. Bartholomew's Hospital* (*Governors*), [1909] 2 K.B. 820 ; 34 Digest 550, *87*.

(2) *Marshall* v. *Lindsey County Council*, [1935] 1 K.B. 516 ; Digest Supp.

(3) *Hall* v. *Lees*, [1904] 2 K.B. 602 ; 36 Digest 106, *718*.

(4) *James* v. *Probyn* (1935), *The Times*, May 29, 1930.

Action for damages for negligence causing the death of the plaintiff's wife, under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934.

Plaintiff's wife was admitted as a paying patient on May 2, 1935, to the Weymouth and District Hospital to undergo an operation. Prior to the operation, on May 7, 1935, the house surgeon gave written instructions on the patient's bed-card that she should be given a dose of six

drachms of paraldehyde in nine ounces of water. Staff Nurse Miles, instead of reading the instructions on the bed-card, acted on the instructions written on a piece of paper by another staff nurse, and administered a dose of six ounces of paraldehyde in nine ounces of water. This dose proved fatal, and the patient died on May 9, 1935. Staff Nurse Miles took the dose of paraldehyde to Staff Nurse Chapman, who checked it with the instructions written on the paper. The plaintiff sued Clayton, A'Court, and Lodge on their own behalf and on behalf of all other members of the General Committee and the trustees of the Weymouth and District Hospital, and Nurses Chapman and Miles.

T. Eastham, K.C., and R. C. Essenhigh, for the plaintiff.

Carthew, K.C., and N. R. Fox-Andrews, for the defendants, Clayton, A'Court, and Lodge.

J. D. Casswell for the defendants, Miles and Chapman.

The arguments are stated in the judgment.

HORRIDGE, J.: In this case the plaintiff sues for damages in respect of the death of his wife, which, he alleges, was caused by the negligence of the defendants, Miles and Chapman, and he also alleges the other defendants, the Hospital Authority, are responsible.

On May 2, 1935, the plaintiff's wife was admitted to the Weymouth and District Hospital, for the purpose of undergoing an operation, for which the plaintiff contracted to pay. On May 6, 1935, Dr. Markby, the house surgeon, on the instructions of Mr. Horton, the plaintiff's surgeon, wrote out on what is called the bed-card, instructions as to the preparation of the patient for the operation. He there stated that six drachms, which were indicated by a recognised symbol, of paraldehyde were to be administered at 8.30 o'clock and at the same time he stated the quantity of atropine which was also to be administered. He decided, however, that the administration of paraldehyde was to be given at 8 o'clock and not at 8.30, and he communicated this to Sister Campbell, who was the day sister in charge. Sister Campbell, according to her evidence, communicated to Sister Damon that the patient was to have six drachms of paraldehyde in nine ounces of water, to be administered per rectum at 8 o'clock, and that she would notice the time on the bed-card was 8.30, but that related only to the atropine. Sister Damon says that she wrote out on a piece of paper the instructions that the paraldehyde was to be six drachms in nine ounces of water at 8 o'clock, and also stated, "Please see bed-card for atropine, 8.30." She handed this to Nurse Miles, who looked at the bed-card and saw that the time for administering the paraldehyde was 8.30, and that she then returned to Sister Damon about the matter and Sister Damon told her these were the sister's instructions and the time had been altered. Nurse Miles did not look at the bed-card to see the quantity of paraldehyde which was to be administered. Nurse Miles said she did not do this because the piece

of paper had on it not six drachms but six ounces of paraldehyde, and as to this she was corroborated by Nurse Chapman. Nurse Miles then poured out the dose of six ounces of paraldehyde and Nurse Chapman checked this, but neither of them looked at the bed-card. Sister Campbell says that on the following morning she saw this slip of paper and she is quite certain that Sister Damon had put upon it six drachms and not six ounces.

I have, therefore, after seeing the witnesses, to decide the question as to what was on the slip of paper and I have come to the conclusion that I must accept the evidence of Sister Campbell and Sister Damon that what was written on the paper was six drachms and not six ounces and that both Nurse Miles and Nurse Chapman were guilty of negligence, the unfortunate result of which was that the patient died without recovering consciousness.

In my view both these nurses were guilty of negligence, even if Sister Damon had written ounces. Nurse Miles had looked at the bed-card and if she had been careful she must have seen that the paraldehyde bracketed with the atropine was there stated to be six drachms.

I am further of opinion that both these nurses ought to have looked at the bed-card in measuring out the dose, in which case they would have seen that it was not six ounces, but six drachms.

I am also of opinion that Nurse Miles was guilty of negligence, because on the bottle containing the paraldehyde the ordinary dose by the mouth was stated to be half to two fluid drachms and she admitted she knew when administered by the rectum the quantity would be at the most three times that when administered by the mouth, whereas the dose she administered was very considerably more than this.

I am therefore of opinion that both the nurses are liable in this action.

The further question remains whether the Hospital Authorities are liable for the acts of either of these two nurses, and I am of opinion they are not.

The administration of the paraldehyde is a skilled operation and though it is quite true that there was a practice in the hospital that all administrations of dangerous drugs should be checked, yet I do not think the Hospital Authorities undertook in any way themselves to administer the doses and that the nurses in doing that were doing their own work as skilled nurses and not as servants of the Hospital Authorities.

I had a number of authorities cited to me, but the one which gave me the most assistance was *Hillyer* v. *St. Bartholomew's Hospital Governors* (1). In that case Kennedy, L.J., at page 829, points out some cases in which the hospital would or would not be liable and that passage in his judgment is referred to by Greer, L.J., at page 518 of the report of *Marshall* v. *Lindsey County Council* (2).

KENNEDY, L.J., says :

But I see no ground for holding it to be a right legal inference from the circumstances of the relation of hospital and patient that the hospital authority makes itself liable in damages, if members of its professional staff, of whose competence there is no question, act negligently towards the patient in some matter of professional care or skill, or neglect to use, or use negligently, in his treatment the apparatus or appliances which are at their disposal. It must be understood that I am speaking only of the conduct of the hospital staff in matters of professional skill, in which the governors of the hospital neither do nor could properly interfere either by rule or by supervision. It may well be, and for my part I should, as at present advised, be prepared to hold, that the hospital authority is legally responsible to the patients for the due performance of their servants within the hospital of their purely ministerial or administrative duties, such as, for example, attendances of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food, and the like. The management of a hospital ought to make and does make its own regulations in respect of such matters of routine, and it is, in my judgment, legally responsible to the patients for their sufficiency, their propriety, and observance of them by the servants.

FARWELL, L.J., at page 826, says :

The contract of the hospital is not to nurse during the operation, but to supply nurses and others, in whose selection they have taken due care. The relation of the hospital to the patient in respect of nurses and attendants supplied by the former for an operation on the latter is the same as that of the Association of Nurses to the patient supplied by them with a nurse, as decided by this court in the case of *Hall* v. *Lees* (3). I take the test applied by LORD COLLINS, then Master of the Rolls, at page 615 : "They are not put in his place to do an act which he intended to do for himself." The nurses and attendants are not put in the place of the hospital to do work which the governors of the hospital intended to do themselves, because they had not undertaken to operate or assist in operating, but only to supply qualified persons to act as nurses and assistants under the control of the operating surgeon.

I do not think this is a matter of a nurse's routine, but one in which she is to use professional skill, and the only duty on the hospital is to see that the nurses they engage are duly qualified persons.

This was not work which Nurse Miles was put in the place of the authority to do or work which the authority intended to do for itself.

In the recent case of *James* v. *Probyn* (4), decided by SWIFT, J. on May 28, 1935, of which I have been supplied with the shorthand note, the learned Judge lays it down after referring to *Marshall* v. *Lindsey County Council* (2) :

Based upon the decisions which have been cited to me and which I have just quoted, the committee of the Hospital contracts with a patient who is going in there that they will provide a hospital, that is to say, an appropriate building suitable for the purpose of a hospital, with a domestic staff for the purpose of running the hospital, whom they will control for the purpose of running the hospital. They also contract that they will employ or engage competent doctors and competent nurses, but I do not think that they undertake in any way to be responsible for the way in which the doctors or the nurses perform their duties. The duties of doctors and nurses are the duties of skilled people to be carried out by skilled people, and

the actions of doctors and nurses cannot be controlled in my opinion by members of a committee who do not for one moment pretend that they have the knowledge or the ability to perform these duties themselves. They do not seem to me to be there as the servants of the committee at all in the sense that the committee can control their method of carrying out their work. That being so, they are not responsible for any negligence of which they may be guilty in the way in which they do carry out their work.

A point was made by Mr. Eastham, on behalf of the plaintiff, that as it was admitted there was a practice in the hospital as to the checking of doses of dangerous drugs, a notice ought to have been put for the nurses to see prescribing the practice, which was as is described by the matron that all the drugs should be checked by the sister or her deputy. If this had been done in this case and Nurse Miles had gone to Sister Damon to check the dose. in all probability the mistake would have been discovered. Nurse Miles and Nurse Chapman both said that they were unaware of the necessity of a check by the sister in charge or her deputy and that was why Nurse Miles got Nurse Chapman, who was considerably senior to herself, to check the dose.

The question I have to decide is whether the omission to publish notices as to checking by the sister in charge or her deputy is negligence on the part of the Hospital Authority. There was no evidence before me that any other hospital put up such notices, but the evidence was that the checking was a well-known practice and this practice was in operation in this hospital.

On the whole, I have come to the conclusion that I cannot rightly say that the omission to put up printed notices was an act of negligence, for which the Hospital Authorities are responsible.

The damages in this case were agreed at £100.

There must be judgment for the plaintiff against the defendants Miles and Chapman for £100 and costs and judgment for the other defendants with costs.

Solicitors : *Litchfield & Kusel*, agents for *Kenneth Kusel*, Weymouth (for the plaintiff) ; *William Charles Crocker* (for the defendants, Clayton, A'Court, and Lodge) ; *Williamson, Hill & Co.*, agents for *Sir Alexander Pengilly*, Weymouth (for the defendants, Chapman and Miles).

[*Reported by* Frank Rowe, Esq. *Barrister-at-Law.*]

POTATO MARKETING BOARD *v.* HARLOW.

[KING'S BENCH DIVISION (Horridge, J.), **March 17, 1936.**]

Agriculture—Marketing scheme—Charge on registered producers—Exceeding basic acreage—Uniform charge on all registered producers—Potato Marketing Scheme, S.R. & O., 1933, *No.* 1186.

The plaintiffs were the Board constituted under S.R. & O., 1933, No. 1186, to administer the Potato Marketing Scheme. Under the scheme they had power to charge any registered producer who exceeded his "basic potato acreage," if such excess was likely in the opinion of the Board to increase their expenditure. The Board in 1934 passed a resolution that their expenditure was likely to be increased if in that year the potato acreage of any registered producer exceeded his basic potato acreage. The resolution then proceeded thus: "and whereas in the opinion of the Board each registered producer ought to contribute the sum of £5 per acre in respect of each acre of his excess acreage towards defraying such increased expenditure, . . . the Board hereby require every registered producer to pay to the Board on or before Aug. 1, 1934, the sum of £5 per acre in respect of each acre by which his potato acreage for the year 1934 exceeds his basic potato acreage":—

HELD: this was not dealing with the registered producers collectively, but with each one separately. The charge of the registered producers was not an arbitrary one, but a proper exercise of the power vested in the Board.

[**EDITORIAL NOTE.** The operation of Marketing Schemes being in restraint of trade, it may be assumed that they are a proper subject for the vigilance of the courts and that the exercise of the powers given by them should be carefully considered in order to safeguard producers and others against any excessive exercise of them. The power in the present case was to charge—i.e., in effect to penalise or fine—any registered producer—as distinct from all registered producers collectively—in respect of over-production, and the particular question was whether the resolution of the Board considered in this case amounted to a collective or a separate charge. The resolution was held upon its wording to be a separate charge; but it would seem that in a case where evidence can be given that the increase in the expenditure of the Board attributable to the excessive acreage of different registered producers is not the same in all cases, it may be possible to argue that a uniform charge would not be a proper exercise of such a power.

AS TO AGRICULTURAL MARKETING SCHEMES, see HALSBURY, Hailsham Edn., Supp. to Vol. 1, para. 643, and FOR THE AGRICULTURAL MARKETING ACTS, 1931-1933, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 26, p. 8 *et seq.*]

Cases referred to:

(1) *R.* v. *Brighton Corpn., Ex p. Shoosmith* (1907), 71 J.P. 265; 33 Digest 21, *88*.

(2) *Roberts* v. *Hopwood*, [1925] A.C. 578; 33 Digest 20, *83*.

ACTION to recover a charge made by the Board upon the defendant as a registered producer under the Potato Marketing Scheme, 1933.

A. T. Miller, K.C., and *Hubert Hull* for the plaintiffs: The Board is a body constituted and governed by S.R. & O., 1933, No. 1186. Under para. 82 of the scheme the Board has power by resolution to require a registered producer who exceeds his basic potato acreage to contribute to the fund of the Board an additional sum not exceeding £5 per acre,

as in the opinion of the Board the registered producer ought to contribute towards defraying such increased expenditure. Under these provisions the Board imposed a charge of £50 on the defendant on Apr. 10, 1934, in accordance with a resolution of the Board that their expenditure was likely to be increased in that year and that each registered producer ought to contribute the sum of £5 per acre in respect of any excessive acreage.

Heathcote-Williams for the defendant: The charge was an arbitrary charge within the meaning of *R.* v. *Brighton Corporation* (1) and not a real exercise of discretion according to the principle in *Roberts* v. *Hopwood* (2). The Board did not at any time apply their minds to what was required of them by the section. The object of this charge was not to meet the requirements of the section, but to penalise production. The Board were only entitled to impose a charge for the purpose of meeting additional expense, which excess acreage was likely to bring about.

Horridge, J.: Mr. Heathcote-Williams has ingeniously done all he can for his client, but after all, I do not think it amounts to anything which ought to interfere with my judgment for the plaintiffs. In this case the defendant admits that the Board is the Board constituted to administer the Potato Marketing Scheme of 1933, S.R. & O., 1933, No. 1186, and therefore the right plaintiffs are before the court. The defendant also admits that the defendant was registered in the register kept by the plaintiff Board. It is also admitted that at all material times the defendant s potato acreage from 1934 exceeded his basic potato acreage by 10 acres.

On Apr. 10, 1934, there was a board meeting of the Marketing Board, and they purported then to act in pursuance of para. 82 of the scheme, which had been duly sanctioned and passed. That para. 82 provides:

> The Board may by resolution require every registered producer to contribute to the fund from time to time such sums as the Board shall determine, but not exceeding in any one year ten shillings per acre of his potato acreage, provided that . . . (*b*) if in any year the potato acreage of a registered producer exceeds his basic potato acreage—

it is now admitted that the defendant's potato acreage did exceed by 10 acres his basic potato acreage—

> and if, in the opinion of the Board, the expenditure of the Board in the operation of this scheme is or is likely to be increased by reason of such excess acreage—.

Here the Board met *bona fide* and honestly and passed a resolution that in their opinion the expenditure was likely to be increased; and they wisely dealt with each registered producer and not with them as a group, because they say it "is likely to be increased if in the year . . . the potato acreage of any registered producer exceeds his basic potato acreage." Therefore they dealt with each separately, and they said

that if anyone increased his potato acreage that would be likely to increase the expenditure of the Board.

On that they passed the resolution that :

Whereas in the opinion of the Board the expenditure of the Board in the operation of the scheme is likely to be increased if in the year ending on Dec. 31, 1934, the potato acreage of any registered producer exceeds his basic potato acreage, and whereas in the opinion of the Board each registered producer ought to contribute the sum of £5 per acre in respect of each acre of his excess acreage towards defraying such increased expenditure, now, therefore, by virtue of the powers in this behalf contained in para. 82 of the scheme, the Board hereby require every registered producer to pay to the Board on or before Aug. 1, 1934, the sum of £5 per acre in respect of each acre by which his potato acreage for the year 1934 exceeds his basic potato acreage.

In this case the defendant had an excess acreage of 10 acres. That 10 acres at £5 an acre comes to £50, for which this action is brought, and for this I give judgment with costs.

Solicitors : *Ellis & Fairbairn* (for the plaintiffs) ; *Edward Betteley, Smith & Stirling* (for the defendant.)

[*Reported by* GERALD A. ABRAHAMS, ESQ., *Barrister-at-Law.*]

Re TAXATION OF COSTS, *Re* A SOLICITOR.

[COURT OF APPEAL (Slesser, Greer, and Scott, L.JJ.), **January 24, March 3, 1936.**]

Solicitors—Costs—Taxation—Counsel's fees not paid before delivery of bill—Costs disallowed for want of retainer—Solicitors Act, 1932 (*c.* 37), *ss.* 65 (1), 81 (1)—*R.S.C. Ord.* 65 *r.* 27, *reg.* 29 (*a*).

Appellant was a solicitor, whose bill of costs was taxed at the instance of the client, Sudbury. The total bill was for £1,670, and was addressed to Sudbury and Green jointly. On the taxation, Sudbury stated that certain portions of the bill of costs related to Green's separate business and that the solicitor was not entitled to treat them as items for which he, Sudbury, was personally liable. The taxing master found for Sudbury and deducted £317 from his bill. The taxing master further taxed off various items which, if added to the £317, resulted in a deduction of more than one-sixth of the total of the bill. The master held that the £317 should be treated as items "taxed off" within the meaning of the Solicitors Act, 1932, s. 66 (5), and therefore ordered the solicitor to pay the costs of the taxation.

Among the items taxed off were disbursements of counsel's fees, amounting to £90. These fees, although paid before the items were reached in the course of the taxation, had not been paid before the bill was delivered, nor even before the commencement of the taxation :—

HELD : (i) items struck out of a bill on the ground of want of retainer should not be considered for the purpose of calculating the one-sixth under Solicitors' Act, 1932, s. 66 (5).

(ii) counsel's fees not paid before the delivery of the bill cannot be allowed on taxation.

(iii) R.S.C. Ord. 65, r. 27, reg. 29 (*a*) has not been rendered *ultra vires* by the passing of the Solicitors Act, 1932. Sects. 81 (1) and 65 (1) must be read together and the words " costs " in the latter section must be read " costs, fees, charges and disbursements."

[**EDITORIAL NOTE.** The first point dealt with in the judgment is the disallowance of counsel's fees not paid before the delivery of the bill to the client. It was suggested that the position here had been altered by the slightly different wording of the Acts of 1932 and 1843, the sections being sect. 65 (1) of the former Act and sect. 37 of the 1843 Act. The difference is explained by the fact that the later Act has a comprehensive definition clause. The other point is, perhaps, of more interest, though it does not appear to have been litigated for the last 100 years. The point is that items disallowed on the ground of want of retainer are not to be included in the calculation of the " one-sixth." The basis of this exception to the rule is that such items are not disallowed by way of taxation, but upon a different ground, i.e., they have been struck out of the bill altogether.

As to Costs of Taxation, see HALSBURY, 1st Edn., Solicitors, Vol. 26, pp. 807-809, paras. 1322-1324; and for the Cases, see DIGEST, Vol. 42, pp. 217-223 Nos. 2440-2550. For R.S.C. Ord. 65 r. 27, reg. 29 (*a*), see the YEARLY SUPREME COURT PRACTICE, 1936, pp. 1502, 1503.]

Cases referred to:

(1) *Sadd* v. *Griffin*, [1908] 2 K.B. 510; 42 Digest 156, *1558*.
(2) *Mills* v. *Revett* (1834), 1 Ad. & El. 856; 42 Digest 218, *2468*.
(3) *White* v. *Milner* (1794), 2 Hy. Bl. 357; 42 Digest 220, *2498*.
(4) *Rigby* v. *Edwards* (1820), " Beames' Costs in Equity," 2nd Edn., 255, L.C.; *revsg.*, 5 Madd. 20; 42 Digest 218, *2466*.

Appeal by the solicitor from an order of Singleton, J., given in chambers on Dec. 17, 1935, and which upheld the decision of the taxing master.

The facts and arguments are fully stated in the judgment of the court.

B. B. Gillis for the appellant.

Constantine Gallop for the respondent.

Scott, L.J.: This is an appeal from Singleton, J., on a question of costs, pursuant to leave granted in part by him on Dec. 17 last and in part by the Court of Appeal on Dec. 20. The appellant, Mr. Griffith, is a solicitor, whose bill was taxed pursuant to an order of Master Ball, dated Nov. 9, 1934, at the instance of the client Mr. Sudbury. The total bill was for £1,670 in respect of work done and disbursements made between Sept., 1929, and June, 1931. It was addressed to Mr. Sudbury and a Mr. Green jointly, and was made out on the footing that the two gentlemen were jointly concerned as clients in all the matters included in the bill. On the taxation, however, Mr. Sudbury, through his solicitors, took the point that certain portions of the bill related to Mr. Green's separate business and that he, Mr. Sudbury, had given Mr. Griffith no retainer entitling him to treat those items as items for which he, Mr. Sudbury, had incurred personal liability. The taxing master decided in Mr. Sudbury's favour on this contention, and deducted £317 from Mr. Sudbury's bill on the ground that the items related to matters with

which Mr. Sudbury had no concern *quoad* taxation of costs. Apart from this excision from the bill of the £317, the taxing master taxed off various items which, if added to the £317, gave a resultant deduction amounting to more than one-sixth of the total of the bill. The taxing master took the view that the £317 ought to be treated as items "taxed off" within the meaning of the Solicitors Act, 1932, s. 66 (5), and he consequently ordered the solicitor to pay the costs of the taxation pursuant to the direction of that sub-section, as he certified no special circumstances within the proviso.

Amongst the items taxed off were certain disbursements of counsel's fees amounting to £90 in all. Although these fees had been paid before the items were reached in the course of the taxation, they had not been paid before the bill was delivered, nor even before the commencement of the taxation. The bill of costs did not contain any statement that the disbursements to counsel had not been made, so as even in form to bring them within the exception relating to unpaid disbursements which R.S.C. Ord. 65, r. 27, reg. 29A, purports to allow.

On these facts the taxing master decided two points against the solicitor: (1) he "taxed off" the £90 for counsel's fees on the ground that they had not been paid before the delivery of the bill of costs, and further, that there was no statement in the bill saying that they had not been paid, and anyhow that they had not been paid "before the commencement of the taxation," as required by the regulation. (2) In regard to the one-sixth rule of the Solicitors Act, 1932, s. 66 (5), he held that the £317 of items which he had disallowed as improperly included in a bill addressed to Mr. Sudbury had, none the less, been "taxed off" by him within the meaning of the statute. As this meant that more than the statutory sixth had been "taxed off," he ordered the solicitor to pay the costs of the taxation.

Objections were brought in by Mr. Griffith against both decisions, but were over-ruled by the taxing master in his answers. An appeal was brought to the judge in chambers on both points, and by order of Dec. 17 last, SINGLETON, J., dismissed the appeal with costs; from this decision the solicitor appealed to this court.

Nothing turns on the particular figures in the case, and they need not be investigated; but on each of the two points in dispute questions of general importance arise.

It will be convenient to dispose of the point about counsel's fees first. On this Mr. Gillis, for the appellant, contended that the prohibition on the inclusion in a bill of costs of unpaid disbursements contained in regulation 29A had since the Solicitors Act, 1932, become inoperative on the ground that it is inconsistent with and therefore *ultra vires* the provisions of that Act. He pointed out that the regulation had been framed under the Solicitors Act, 1843, s. 37; but that Act

had been repealed by the Act of 1932, and his submission was that, although the present Act purports only to be a codifying Act, it in fact contains no section equivalent to sect. 37 of the Act of 1843. We think this argument is unsound. It is true that the text of regulation 29A uses the phrase "fees, charges and disbursements" which was contained in sect. 37 of the repealed Act of 1843, and indeed that in the White Book of 1936 there is a marginal note referring to the Solicitors Act, 1843, as if that Act were still unrepealed; but the argument that sect. 37 of the Act of 1843 is not re-enacted in the Act of 1932 does not pay sufficient attention to the actual language of the present Act. By the definition contained in sect. 81 (1) the words "fees, charges and disbursements" are to be read into the word "costs" wherever it is used in the Act; and the substantive enactment of sect. 65 (1) runs as follows:

> Subject to the provisions of this Act, no action shall be brought to recover any costs due to a solicitor until one month after a bill thereof has been delivered in accordance with the requirements of this section.

Having regard to the definition, the phrase "costs due to a solicitor" must in the case of disbursements be interpreted as meaning disbursements due from the client to the solicitor. If so, the section has precisely the same wording as sect. 37 of the Act of 1843, or indeed as sect. 23 of the Act of 2 Geo. II, c. 23, which sect. 37 of the Act of 1843, so far as relates to this point, re-enacted, and the Act of 1932 has therefore made no change in the law. A "disbursement" charged by a solicitor against his client for counsel's fees must always have meant a disbursement actually made—money paid out of the pocket of the solicitor—since *ex hypothesi* counsel's fees, being in law mere gratuities, and not constituting a debt from the solicitor to the barrister, cannot be "due" from the client to the solicitor until the latter has actually paid counsel. That this was so under the Act of 1843 was made perfectly clear by the judgment of this court in the case of *Sadd* v. *Griffin* (1); and since the words "costs due to a solicitor" in sect. 65 have the same meaning, a solicitor is still prohibited from putting into his "bill thereof" any "disbursement" in respect of counsel's fees which he has not already paid, or at any rate unless at latest he pays it before delivering his bill to his client.

What, then, is the true position in regard to the argument that regulation 29A is *ultra vires*? Clearly its first four lines are just as consistent with the new Act as with the old; that part is not *ultra vires*. In regard to lines 4 to 11 of the regulation we need not consider the question of *ultra vires* for nothing in this appeal turns upon that part, but we must not be understood to express any affirmative view that that part of the regulation can have the effect of authorising the inclusion in the bill of costs of any disbursement which is not "due" as a legally

enforceable debt from the client to the solicitor. In the case of counsel's fees there cannot be any debt until after actual payment by the solicitor to counsel. To enter unpaid counsel's fees in the bill of costs under the permissive words of the regulation would be a direct violation of the prohibition of the statute. The wording of the regulation should be considered by the Rule Committee.

On this first point the appeal must be dismissed.

On the second question we think the appellant is entitled to succeed. The cases of *Mills* v. *Revett* (2) and the older case of *White* v. *Milner* (3) are clear authority for the proposition that where items in a solicitor's bill are struck out of it at the instance of the client because the business in question was never included in any retainer given by him, those items ought not to be considered for the purpose of estimating the one-sixth "taxing off" under sect. 23 of 2 Geo. II, c. 23, or sect. 37 of the Act of 1843. The case of *Rigby* v. *Edwards* (4), a decision of LEACH, V.-C., to the opposite effect, is not an authority as the Vice-Chancellor's decision was overruled by LORD ELDON, L.C., as appears from the note in BEAMES ON COSTS, 2nd Edn., pp. 255-60. In that appeal LORD ELDON said (p. 257):

> What they have said in the common law courts is this, you shall not come here and say, the master has taken off more than one-sixth, when you yourself state not that he has taken it off, but that you have taken it off. The Vice-Chancellor however, decided differently.

and on page 259:

> That principle is intelligible enough, that if A.B. objects against C.D. considering as part of a taxable bill the costs of a certain suit in that bill, he cannot be heard to say, that that has been taxed, which he has objected should not be taxed at all. Looking to the decisions on the statute, there appeared to be a good deal of justice in that; and it struck me, that what was thus struck out of the bill was struck out not upon taxation, but on quite a different ground; and the costs, therefore, ought not to be paid by the attorney.

On page 260 the learned editor adds a note:

> This case was afterwards disposed of by LORD ELDON. He said, the practice of the clerks in court was one way: the opinion of the judges at law the other way. He thought the judges right; and should, therefore, follow them: and he made the order accordingly following the case of *White* v. *Milner*.

We think that the phrase "taxing off" contained in the series of statutes (2 Geo. II, c. 23; Solicitors Act, 1843, and Solicitors Act, 1932) means a reduction of the bill by the taxing master where the business involved is within the retainer, and not where the client says "This is business with which I have no concern, it ought never to have been in the bill at all." On this footing the £317 odd of items which concerned Mr. Green and did not concern Mr. Sudbury at all, ought not, for the

purpose of calculating the one-sixth, to have come into the calculation at all, and if so, less than one-sixth was "taxed off." On this point the appeal must be allowed.

As the appellant has succeeded on one point and failed on the other, we think that the appellant should be paid half his costs here and below.

Solicitors: *Percy Bono & Griffith* (for the appellant); *Phillips Bennett & Co.* (for the respondent).

[*Reported by* Frank Rowe, Esq., *Barrister-at-Law.*

PHILIP MICHAEL FARADAY *v.* THE AUCTIONEERS' AND ESTATE AGENTS' INSTITUTE OF THE UNITED KINGDOM

[Court of Appeal (Lord Wright, M.R., Romer and Greene, L.JJ.), **February 5, and March 11, 1936.**]

Auctioneers—Professional Association—Restrictions on Members—Rule of Conduct—"Establish or join, either as principal or assistant, any commercial firm."

Messrs. Harrods, Limited, the owner of the well-known London store, carried on as an adjunct thereto a business of estate agents and valuers. By an arrangement with the plaintiff, circulars were sent in the name of Harrods to owners of property, inviting them to employ Harrods in connection with a quinquennial valuation, and any business resulting was to be the business of Harrods. The circular contained these words: "Messrs. Harrods have retained the services of a famous Rating Expert, Mr. Michael Faraday." A nominal fee was to be charged and a percentage of any reduction obtained was asked for. The remuneration received was divided between Harrods and the plaintiff in agreed proportions. The plaintiff working in his own office, dealt with practically all business resulting from the circulars:—

Held: the conduct of the plaintiff was a breach of the rule of the defendants that "no member shall establish or join, either as principal or assistant, any commercial firm or undertaking for the purpose of carrying on or assisting to carry on professional business as an adjunct to or in connection with the commercial business of such firm."

[**EDITORIAL NOTE.** It has to be noted that the rule of conduct does not prohibit assisting a commercial firm, but only joining the firm as assistant. The decision is, therefore, only upon a particular rule; but as according to the decision herein the Auctioneers' Institute have adopted an effective formula for the purpose they had in view, no doubt other bodies desiring to effect a similar result will adopt this formula, which has been so fully considered by the court.

For the Law upon such Relationships as are here discussed, see HALSBURY, 1st Edn., Vol. 20, Master and Servant pp. 64-70, paras. 131-136, and for the Cases, see DIGEST, Vol. 34, pp. 19-33, Nos. 1-103.]

Appeal from a decision of Eve, J., given on June 26, 1935, dismissing the action.

On Dec. 6, 1934, the Council of the Institute passed a resolution that unless Faraday determined his association with Harrods and gave an

undertaking not to renew such association, he should be expelled for a breach of article 38 (1) of the Institute being one of the Rules of Conduct. Faraday issued a writ on Jan. 28, 1935, claiming (i) a declaration that he had not violated the article, (ii) an injunction restraining the Institute, its council and officers from suspending or expelling him, and (iii) damages.

Sir William Jowitt, K.C., Lionel Cohen, K.C., and F. Grant, for the appellant: Everything turns on the construction of this rule. The fees were divided between Harrods and Faraday. Faraday was always free to say: "I will not take this case." Harrods were also free to act in a similar manner. The sole question is: "Can you say that Faraday has joined Harrods as an assistant?" When you are construing an article such as this, you must do so strictly. "Assistant" means someone in the position of a servant. An independent contractor cannot be a servant.

Gavin Simonds, K.C., and *Roger Turnbull,* for the respondents: It makes no difference that Faraday in fact did the work himself or by his staff. He is within the article, since he has assisted Harrods in carrying on a professional business as an adjunct of their commercial business. He would still be within the article if only one transaction were carried through. A dissatisfied client would have to seek his remedies against Harrods and would have no remedy against Faraday.

Sir William Jowitt, K.C., replied.

LORD WRIGHT, M.R.: The judgment which GREENE, L.J., will now read will be the judgment of the court.

GREENE, L.J.: The defendants (hereinafter called "the Institute") are a company incorporated under the Companies Acts for the purpose of advancing the interests of auctioneers, estate agents and valuers, and in particular of the members of the Institute. The articles of association lay down the conditions of membership of which there are six grades, the first in order being that of Fellow. Article 38 prescribes certain rules of conduct which "shall be deemed to be fundamental Rules of the Institute." By article 39 breach of any of these rules of conduct makes a member liable to suspension or expulsion by vote of the Council of the Institute.

The plaintiff, Mr. Faraday, has for many years been in practice as a surveyor and valuer with offices in Chancery Lane. He was elected a Fellow of the Institute on Sept. 26, 1900, and was still a Fellow when the events took place which have given rise to this action.

On Dec. 6, 1934, the council of the Institute, purporting to act under article 39, passed a resolution to the following effect: "(*a*) That unless before Feb. 1, 1935, Mr. P. Michael Faraday satisfies the council that he has determined his association with Harrods, Limited, his membership of the Institute will be suspended as from that date until the expiration

of his contract with Harrods, Limited, and (*b*) Unless prior to Feb. 1, 1935, he will give an undertaking to the council that he will not in any event renew his association with Harrods, Limited, at the end of his present contract with them the council will have no alternative to exercising its powers of expulsion under article 39."

This resolution was passed because in the opinion of the council the plaintiff had committed a breach of the fundamental Rule of Conduct embodied in Article 38 (1), which is to the following effect: (1) No member shall establish or join, either as principal or assistant, any commercial firm or undertaking for the purpose of carrying on or assisting to carry on professional business as an adjunct to or in connection with the commercial business of such firm.

The writ in this action was issued on Jan. 28, 1935, and by the prayer of the statement of claim, so far as it is now relevant, the plaintiff claimed a declaration that he had not violated article 38 (1), an injunction to restrain the Institute, its council and officers from acting on the resolution referred to above and from suspending and expelling the plaintiff from membership of the Institute and damages.

By its defence the Institute alleged that the plaintiff had violated article 38 (1) and that the council was entitled to suspend or expel him from membership of the Institute. In particulars delivered on Mar. 5, 1935, the Institute specified the particular way in which it alleged that the plaintiff had violated article 38 (1), namely "by reason of the fact that he has joined as an assistant Harrods, Limited, (being a commercial firm and/or undertaking), for the purpose of assisting to carry on professional business as an adjunct to or in connection with the commercial business of Harrods, Limited."

No complaint is made by the plaintiff of any failure by the council to comply with the rules of procedure laid down by article 39 The Institute, on its part, raises no question as to the jurisdiction of the court to decide the substantial matter in issue between the parties. The sole question, therefore, which arises for determination in this appeal is whether or not upon the true construction of article 38 (1) the plaintiff had "joined as an assistant Harrods, Limited . . . for the purpose of assisting to carry on professional business as an adjunct to or in connection with the commercial business of Harrods, Limited." If the answer to this question (which is one of difficulty) is in the affirmative, it follows that the plaintiff has committed a breach of the contract contained in the articles and is liable to have the terms of that contract enforced against him.

It now becomes necessary to state the facts which have given rise to this question. Harrods, Limited, carry on the business of estate agents and valuers as an adjunct to or in connection with their well-known commercial business. In the summer of 1933 the quinquennial re-

valuation of properties for rating purposes was approaching and conversations and correspondence took place between the plaintiff, who was specially skilled in rating matters, and Harrods, Limited, with a view to making an arrangement for doing business together in connection with the re-valuation.

On the side of Harrods, Limited, the negotiations which led up to the arrangement ultimately made and the subsequent carrying out of the arrangement were in the hands of Mr. Robinson Smith, the manager of the estate offices of Harrods, Limited.

The arrangement made between the plaintiff and Harrods, Limited, is not embodied in any formal contract, and its nature must be gathered from the correspondence which passed, the conduct of the parties and the direct evidence given at the trial. In its main features it was as follows. Circulars were to be sent to occupiers of business and private premises inviting them to employ Harrods, Limited, in connection with the re-valuation. These circulars were to be sent (as in fact they were sent) in the name of Harrods, Limited, and any business that resulted was to be the business of Harrods, Limited. The actual work, however, was to be done on behalf of Harrods, Limited, by Mr. Faraday in any case which Harrods, Limited, might choose to pass to him and he might choose to accept. In such cases the remuneration payable by the client was to be divided between Harrods, Limited, and Mr. Faraday in agreed proportions.

Two circulars were sent out, one relating to London properties, and the other to properties in England and Wales outside London. The original drafts were prepared by Mr. Faraday and sent to Mr. Robinson Smith for his comments on Aug. 2, 1933. They were in form drafts of circulars intended, apparently, to emanate from Harrods, Limited, although their name is not mentioned. In their main lines they corresponded with the actual circulars ultimately sent, save that they contained no reference to Mr. Faraday. Instead they contained the statement: "We have on our staff rating experts of great ability, who practice in this type of work."

On Aug. 24, 1933, Mr. Robinson Smith returned the draft of the London circular with some alterations, the chief of which was the excision of the statement just quoted and the substitution of the statement: "We have made an arrangement with a well-known rating expert of great experience to jointly carry out this work."

On Nov. 22, 1933, Mr. Robinson Smith sent to Mr. Faraday a further draft of the London circular, in which the statement last quoted was replaced by the statement: "We have obtained the services of a famous rating expert, Mr. Michael Faraday."

In the meanwhile, Harrods, Limited, had been approached by a Mr. Morgan, with a view to obtaining their services in connection with the

re-valuation of a property in Dorsetshire belonging to a client of Mr. Morgan. This was communicated by Mr. Robinson Smith to Mr. Faraday, who, on Nov. 22, prepared and sent to Mr. Robinson Smith a draft of the reply to be sent by Harrods, Limited, to Mr. Morgan. This letter contained the statement: "As a matter of fact we have retained Messrs. Michael Faraday and Partners to act for us in these appeals and the fee will not exceed five guineas and out-of-pocket expenses, plus ten per cent. of any saving for one year that we may effect on behalf of your client." Mr. Robinson Smith, on behalf of Harrods, Limited, replied to Mr. Morgan in the form of this draft, with one or two slight alterations, and on Nov. 23 he wrote to Mr. Faraday, saying: "I will let you know when he wishes you to go down to the house."

On Dec. 20, 1933, Mr. Robinson Smith sent a further draft of the London circular to Mr. Faraday and suggested that instead of saying "obtained the services" of Mr. Faraday, it should say "retained." This draft was with a verbal alteration approved by Mr. Faraday in a letter to Mr. Robinson Smith on Dec. 21, in which he said: "There can be no ambiguity about the fact that it is your work, except that I am going to do it for you." Subsequently, the draft of the country circular was agreed and the two circulars were duly sent out some time in Jan., 1934.

The London circular was headed "Harrods, Limited. Auctioneers, Land and Estate Agents, Surveyors and Valuers," and was directed from "Estate Offices, 62 and 64, Brompton Road." The body of it was as follows: "*Quinquennial Re-Valuation*: 'Messrs Harrods beg to inform you that the re-valuation of London properties is now in progress. An assessment form will shortly be issued: *the amount of your rates for the next five years* may depend upon the information given on that form. In view of the fall in rental value of certain classes of property, if you are not represented by a Surveyor or Valuer, Messrs. Harrods have retained the services of a famous Rating Expert, Mr. Michael Faraday, and we shall be happy to advise you upon this matter and, if necessary, serve the requisite notice of objection and undertake the appeal before the Assessment Committee. If you are interested and will fill in the enclosed form, a quotation will be sent to you, which includes a nominal fee for advice and a percentage of any reduction obtained. In the event of no reduction being obtained your liability will therefore be negligible.' "

The country circular was, with minor variations, in the same form, except that after the name of Mr. Michael Faraday, there were added the words "to assist them." The addition of these words does not alter the position in any material respect, as indeed was clearly the view of Mr. Faraday himself, who suggested them in a postscript to a letter to Mr. Robinson Smith of Jan. 5, 1934.

On Jan. 15, 1934, Mr. Faraday wrote to Mr. Robinson Smith, saying : " As soon as the replies to the circulars come in I will commence operations for you."

The procedure adopted by Harrods, Limited, and Mr. Faraday pursuant to the arrangement made between them, was as follows. Mr. Robinson Smith forwarded to Mr. Faraday enquiries received in response to the circulars. Mr. Faraday then drafted letters in reply and forwarded them to Mr. Robinson Smith who, on behalf of and in the name of Harrods, Limited, wrote to the clients in the form of the letters so drafted. As an example, we may take the case of a property at Sunningdale. The client's application was sent to Mr. Faraday by Mr. Robinson Smith on Mar. 9, 1934. The draft of the reply to be sent by Harrods, Limited, as drafted by Mr. Faraday, was as follows : " We should be happy to assist you by advising you as to the value of this property, serving the necessary notice of objection and generally carrying the matter through for you, for a fee of seven guineas and out-of-pocket expenses, plus half the saving in rates for one year, as the result of the service of notice of objection. If these terms are acceptable to you and you would let us know, we will proceed immediately with the matter."

In the case where notice of objection was served Mr. Faraday wrote to Mr. Robinson Smith on June 22, 1934, as follows : " With reference to the above property, we enclose herewith notice of objection to the Rating Authority's proposal, which we have completed and will be obliged if you will date and sign the objection as agents for Dr. Wigmore. We are sending this letter by hand, in order that you may serve the objection immediately on the Rating Authority, as there is some urgency in this matter. We also enclose draft letter, which we suggest you should enclose with the notice of objection."

The draft letter enclosed was addressed to the Borough Treasurer concerned and was in the following terms : " On behalf of our client, Dr. A. J. O. Wigmore, we enclose herewith notice of objection to your proposal dated June 11, 1934, relating to the above property, and shall be glad if you will acknowledge receipt thereof."

It is not clear from the evidence what work was done by Mr. Faraday, apart from drafting the necessary letters for Harrods, Limited, to send to their clients and such documents as notices of objection. Mr. Faraday stated that only one case—that of Mr. Morgan—was really finished, and we infer that in that case at any rate, Mr. Faraday did all the work connected with the appeal. In cases which were not carried to completion, we infer that in like manner Mr. Faraday did all the work that fell to be done, such as interviewing clients and inspecting their property.

With regard to the number of applications from clients in answer to the circulars which were dealt with under the arrangement, Mr. Robinson

Smith stated that they were all referred to Mr. Faraday, although Mr. Faraday stated that there was one case which was conducted by Harrods, Limited, themselves.

The only other references to the relationship between the parties which need be made are to the following questions and answers: *Mr. Faraday's examination in chief:* (Q.) "Do Messrs. Harrods exercise any control over your performance of the work?" (A.) "No." *Mr. Robinson Smith's cross-examination:* (Q.) "Every case was referred to Mr. Faraday and in every case Mr. Faraday made his proposals, which were subject to your approval?" (A.) "Yes. I do not think you ought to say my own personal approval." (Q.) "No. The approval of you or other persons employed by Harrods?" (A.) "Yes."

It should be mentioned that Mr. Faraday advised Harrods, Limited, in connection with the re-valuation of property of their own. No complaint is made with regard to this nor do we see how any complaint could have been made.

We have summarised at some length the relevant matters in the correspondence and the oral evidence, since it is upon the exact nature of the relationship so disclosed, considered in relation to the language of the rule of conduct alleged to have been broken, that the present question turns. The rule is couched in popular and not technical language. The words "join," "principal" and "assistant" have no technical meaning. The prohibition is against joining "any commercial firm or undertaking," words which undoubtedly cover limited companies and individuals. In the case of a limited company, it is difficult to see how a person could "join" it as a "principal"—Mr. Robinson Smith himself, although the head of the estate department of Harrods, Limited, would, we think, be an "assistant" within the meaning of the rule. Indeed, any one who "joins" a limited company "for the purpose of assisting to carry on professional business" would, we think, join as "assistant." The two words "principal" and "assistant" are, in our judgment, intended to be an exhaustive description of the capacities in which a "firm or undertaking" can be "joined for the purpose of assisting," although the word "principal" would only be apt to describe the position where a member "joins" a firm or an individual.

The context in which the words "principal or assistant" are found in article 38 (1), makes it, in our judgment, impossible to construe them in some restricted way by reference to the words "principal" and "assistant" as used in other articles dealing with different subject matters. In article 8 (*a*) (qualification for fellow) the phrase used is "has been in practice as a principal and/or assistant." In article 9 (qualification for associates) the phrases used are "served . . . as an assistant . . . in an approved office" and "been in professional practice as a principal." In article 11 (students) the phrase used is "serving

or intending to serve . . . as assistant in an approved office." In article 20 (membership of branches) the phrase used is " the office where he serves as an assistant." Except in article 8, wherever the word " assistant " appears in these articles, it is used in conjunction with the expression " serve in an office," which sufficiently defines and restricts the nature of the position occupied. In article 8 the expression " has been in practice as an assistant " may well have a wider meaning.

It is pointed out by Sir William Jowitt that article 38 (1) does not say " no member shall assist any commercial firm or undertaking " and that the word " join " shows that the prohibited relationship must be something different from that of a person who merely assists. With this we agree. On the other hand we are unable to agree that the relationship must be that of master and servant in the strict sense contended for by Sir William Jowitt, namely, that the person " joining " is to be subject to directions not only as to what work he is to do, but as to how he is to do it. It appears to us that according to the ordinary meaning of language a person may " join as assistant for the purpose of assisting to carry on professional business " without necessarily entering into the relationship of a servant to his master. A professional man may well " join " an " undertaking " on the terms that he is to be free to exercise his professional skill without being under the obligation to conform to any directions as to how he is to do his work. Moreover, we do not think that the words are to be limited to a case where the member " joins the staff " of a company in the sense that he enters into a whole-time employment with it. The fact that the member may continue to do outside work of his own appears to us to be irrelevant. Lastly, we do not think that the words refer to some permanent relationship—a member would, in our opinion, break the rule if he " joined " for the purpose of conducting one particular piece of business or the work of one particular client.

Another angle from which the relationship may usefully be considered is that of the relationship of the member and the undertaking to the client. If a client gives joint instructions to a member and, for example, Harrods, Limited, we do not think that it could be said that the member had " joined " Harrods, Limited. In such a case both the member and Harrods, Limited, preserve their separate individualities in relation to the client, each is in direct contractual relationship to the client and is liable to the client accordingly. In the present case the position is entirely different. The clients are clients of Harrods, Limited, alone, there is no contractual relationship between the clients and Mr. Faraday, all the work is done in the name of Harrods, Limited, and it is they who would be liable to the client if through some act or default of Mr. Faraday the contract with the client was broken. So far as the client is concerned, Mr. Faraday does not exist, save as a person who in the name

and on behalf of Harrods, Limited, is doing the work which the client has instructed Harrods, Limited, to do on his behalf. The position, indeed, appears to us precisely the same as it would have been if Mr. Faraday had moved into the estate office of Harrods, Limited, and done the work from there. We cannot see that the conduct of the parties would have been different in any material respect if that had been done. The circumstances that Mr. Faraday remained in his own office and continued to do his own work when he was not working for Harrods, Limited, appear at first sight to lend colour to his case, but these circumstances are, in our opinion, irrelevant.

Reliance was placed by Sir William Jowitt upon the fact that under the terms of the arrangement, Harrods, Limited, were not bound to employ Mr. Faraday in any case, and Mr. Faraday was not bound to accept any case in which Harrods, Limited, asked him to act. We do not attach any importance to this circumstance. We have already pointed out that, in our view, a member may "join as assistant" for a single case, and as and when a case was passed to and accepted by Mr. Faraday he did, in our opinion, "join as assistant" for the purposes of that case, the terms upon which he did so being those contained in the general arrangement agreed upon by the parties.

In the result we take the view that the learned judge was right in dismissing the action.

The words which require to be construed fall within the common class of words, whose meaning is not susceptible of any precise or comprehensive definition. In such a case the only safe method to pursue is to use one's ordinary sense of language in relation to the particular facts and form a conclusion as to whether the case falls on one side of the line or the other. In our opinion the present case falls on the wrong side of the line and the appeal should be dismissed with costs.

Leave to appeal to the House of Lords granted.

Solicitors : *Richardson, Sadler & Co.* (for the appellant) ; and *Norton, Rose, Greenwell & Co.* (for the respondents).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

RUSSIAN AND ENGLISH BANK (IN LIQUIDATION) AND ANOTHER *v.* BARING BROTHERS & CO. LTD.

[HOUSE OF LORDS (Lord Blanesburgh, Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Maugham), **October 29, 31, November 7, 8, 11, 1935, and March 12, 1936.**]

Companies—Russian Bank with London branch—Bank dissolved by Russian law—Compulsory winding up of London branch as unregistered company—Action by liquidator on behalf of company—Whether company re-created by winding up order—Companies Act, 1929 (*c.* 23), *ss.* 190, 191 (1), 337, 338 (1) (*d*), 342.

A bank, incorporated under Russian law in 1910 with its head office in Petrograd, established a branch in London in 1915. In 1921 an action was brought by the London branch for recovery of two sums of moneys due and payable to the plaintiff bank and held by the defendant bank. In 1932 the court made an order staying this action on the ground that the Russian bank, having been dissolved by Russian law shortly after 1917, had ceased to exist. An order for the compulsory winding up of the Russian bank, under the Companies Act, 1929, s. 338, was made in 1932. Later, the court declined to remove the stay in the first action, holding that sect. 338 did not have the effect of re-creating or avoiding the dissolution of the Russian bank. By leave of the court the liquidator thereupon brought the present action, under sect. 191 of the Act of 1929, in the name of the Bank, to recover the said sums of money :—

HELD (LORD RUSSELL OF KILLOWEN and LORD MAUGHAM dissenting) : as the order for winding up was valid, the order under the Companies Act, 1929, s. 191, giving leave to the liquidator to bring the present action was rightly made, and the action was therefore properly constituted and could be proceeded with.

Orders of the Court of Appeal and Clauson, J., reversed.

[**EDITORIAL NOTE.** The Bank having been dissolved in Russia became a non-existing person and therefore no action could be brought in its name in England in the ordinary way. There being a branch in England to which certain sums of money were due, an order was made to wind up the branch as an unregistered company. In the ordinary way the making of a winding up order would invest the liquidator with the power to bring or defend any legal proceedings in the name of the company. As such proceedings would be brought in the name of the company, the actual plaintiff would be a non-existent person, and objection could be taken to the action upon this ground. The question therefore arises whether a liberal interpretation shall be given to the statutory powers of a liquidator and thus override this difficulty (the view taken by the majority of their Lordships), or whether full force should be given to the rule that no action can be brought in the name of a non-existent plaintiff (the view taken by the minority).

AS TO THE WINDING UP OF FOREIGN COMPANIES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 870, 871, paras. 1513-1515 ; and FOR CASES, see DIGEST, Vol. 10, pp. 1206-1208, Nos. 8535-8553 ; FOR THE COMPANIES ACT, 1929, see HALSBURY'S STATUTES OF ENGLAND, Vol. 2, p. 775 *et seq.*]

Cases referred to :

(1) *Rudow* v. *Great Britain Mutual Life Assurance Society* (1881), 17 Ch. D. 600 ; 10 Digest 1097, *7687.*

(2) *Re London and Caledonian Marine Insurance Co.* (1879), 11 Ch. D. 140; 10 Digest 1032, *7159.*
(3) *Re Pinto Silver Mining Co.* (1878), 8 Ch. D. 273; 10 Digest 1032, *7158.*
(4) *Re Higginson and Dean, Ex p. A.-G.*, [1899] 1 Q.B. 325; 4 Digest 490, *4403.*
(5) *Banque Internationale de Commerce de Petrograd* v. *Goukassow*, [1923] 2 K.B. 682,; 10 Digest 1204, *8524.*
(6) *Re Henderson's Nigel Co., Ltd.* (1911), 105 L.T. 370; 10 Digest 1034, *7176.*

Appeal from an order of the Court of Appeal affirming a decision of Clauson, J.

The history of the proceedings and the facts are fully stated in the judgment of Lord Blanesburgh.

Lionel L. Cohen, K.C., and *H. Wynn Parry* for the appellants.

Gavin T. Simonds, K.C., and *A. Andrewes-Uthwatt* for the respondents.

Lord Blanesburgh: My Lords, the Russian and English Bank, in whose name as principal party this appeal is brought, I will refer to it as the Bank, was incorporated in Russia under Russian law in Apr., 1910, and with its head office at Petrograd carried on for some years the business of banking on a large scale. In Dec., 1915, it opened a branch in London, observing then all the requirements of the Companies (Consolidation) Act, 1908, s. 274. The branch did an extensive business in this country until June, 1920—a date some years after the Russian revolution and, as now appears, more than two years after the Bank as a result of decrees of the Soviet Government had been dissolved or had ceased to exist by Russian law. The date of that event may now, I gather, be taken to have been Jan. 26, 1918.

Following upon transactions of some complication in which the Czarist Government were concerned, but the details of which are not at present material, there were in Nov., 1917, left in the hands of the respondents, Baring Brothers, for the account as is alleged of the London branch of the Bank, two sums of £80,000 and £100,000. As the claim of the Bank to have these moneys paid over to it was not recognised by the respondents, the Bank on Mar. 23, 1921, brought an action in the Chancery Division of the High Court of Justice to recover these sums with interest. Pleadings in this, the first action, were duly delivered, but, owing mainly it would seem to uncertainty in this country as to the actual position of Russian banks under the decrees of the Soviet Government, proceedings were left in abeyance until June 18, 1931. By that date it had been ascertained that for some considerable time and possibly prior to the commencement of the action the Bank had in fact been dissolved in Russia. The respondents accordingly took out a summons in the first action asking for an order that all further proceedings therein be stayed on the ground that the action had been commenced or at all events was being continued in the name of a plaintiff who was non-existent. An order for costs personally against the solicitors on the

record for the Bank was also asked for. At the hearing of the summons on the admission made that the Bank had certainly ceased to exist in Russia prior to the date of the summons, EVE, J., on Jan. 12, 1932, held that the action was no longer maintainable and that all further proceedings in it must be stayed. He suggested, however, that creditors' claims against the assets of the Bank might still be established, in a winding up made on a petition presented to the court under the Companies Act, 1929, s. 338. On Feb. 9, 1932, a creditors' petition, inspired doubtless by that suggestion of the learned judge, was presented to the court praying, under the section of the Act referred to, for a winding up order. On that petition and in the presence of and without objection taken by the Attorney-General, a winding up order was, on Mar. 8, 1932, made by BENNETT, J., and on July 20 following, Mr. Edward Maloney, a chartered accountant, with a committee of inspection, was appointed liquidator for the purpose of the winding up. The learned judge made the winding up order under the power conferred upon the court by sect. 338 (1) (*d*) (i) of the Act on evidence adduced that the Bank, an unregistered company, had in Russia been dissolved with its affairs in this country unliquidated.

On Dec. 13, 1932, the liquidator applied to BENNETT, J., to remove the stay in the first action directed by EVE, J., prior to the winding up order. The application was made on the suggestion that the status of the Bank in an English court had in relation to any proceedings made necessary by the winding up been restored. But BENNETT, J., refused to interfere. EVE, J., he said, had made his order because there were no plaintiffs before the court. From the moment of his order the action was dead for all purposes. Nor had the Bank been re-animated as a result of the winding up order. Accepting that decision, the liquidator, having duly obtained the leave of the court, and with the authority of the committee of inspection instructed his solicitors, Messrs. F. M. Guedalla & Co., to issue in the name of the Bank, as plaintiff, the writ in the action out of which this appeal proceeds (to be referred to as the present action). Pleadings have been delivered—the defence of the respondents submitted without prejudice—and it clearly appears that the issues are substantially the same as were those in the first action, the relief claimed being, I think, identical.

In that state of things, on July 18, 1934, the respondents took out a summons against the Bank and Messrs. Guedalla & Co. asking in the present action for an order staying all proceedings therein on the ground that the plaintiff Bank was a dissolved corporation: as before, too, an order upon the solicitors personally to pay the costs of the respondents taxed as between solicitor and client was asked for: on Oct. 9, 1934, CLAUSON, J., made the order in these terms: an appeal to the Court of Appeal was on Nov. 20, 1934, dismissed. This appeal in the name of

the Bank, with Messrs. Guedalla & Co. joining as co-appellants in respect of the order made against them for costs, is an appeal from that order of the Court of Appeal.

Clauson, J. treated the refusal of Bennett, J. to remove the stay in the first action as a decision that the winding up order did not avoid the dissolution brought about by the foreign law. By that decision he was bound. But he followed it with no reluctance because it commended itself entirely to his own judgment. The non-existent plaintiff could no more sue now than it could before the winding up order. It had not been re-animated and the dissolution was not avoided. Sect. 191 of the Act did not appear to him to create in the liquidator a new cause of action in the name of the company which the company itself could not enforce by action. He did not understand how a liquidator could sue on behalf of a non-existing company. The learned judge suggested that a recourse to the machinery provided by sect. 190 of the Act, to which, as to sect. 191, reference will presently be made, might provide an escape from the difficulty and he offered counsel an adjournment to consider that suggestion. But he was not concerned then to decide whether there was any such machinery available. Slesser and Roche, L.JJ., on appeal, took the same view. The company in such a case as this Slesser, L.J., said: "has no name and there is no company on behalf of which the action can be brought." Both of the Lords Justices, while not finally so deciding, were strongly of opinion that sect. 190 provided the remedy for the liquidator if he chose to avail himself of its machinery.

My Lords, I find myself at variance with the learned judges on these matters, but I will not give my reasons until I have drawn your Lordships' attention to some sections of the Companies Act, 1929, the statute upon which, of course, everything must depend. Many of its provisions were referred to during the argument. In detail these are too lengthy for citation here But it may be convenient, if only for purposes of immediate reference that I should now set forth textually the sections of the statute immediately relevant, enclosing in square brackets the provisions which appear in the code for the first time, tentatively in the Companies Act, 1928, and, effectively in the consolidating statute which followed in the next session of Parliament.

The sections or parts of sections taken from Part X of that Act and immediately relevant are as follows:—

Winding up of Unregistered Companies.

337.—For the purposes of this part of this Act, the expression "unregistered company" shall include any trustee savings bank . . . and any partnership, whether limited or not, any association and any company with the following exceptions . . . . . .

(3) A partnership, association or company which consists of less than eight members [and is not a foreign partnership, association or company].

338 (1).— Subject to the provisions of this part of this Act any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with the following exceptions and additions. . . . . .

. . . . (*c*) No unregistered company shall be wound up under this Act voluntarily or subject to supervision.

(*d*) The circumstances in which an unregistered company may be wound up are as follows :—

(i) If the company is dissolved . . .

(ii) If the company is unable to pay its debts ;

(iii) If the court is of opinion that it is just and equitable that the company should be wound up.

[(2) Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain it may be wound up as an unregistered company under this part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.]

342.—The provisions of this part of this Act with respect to unregistered companies shall be in addition to and not in restriction of any provisions hereinbefore in this Act contained with respect to winding up companies by the court, and the court or liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under this Act :

Provided that an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this part of this Act.

The " provisions with respect of winding up " referred to in sect. 338 (1) above are contained in Part V of the Act. I need only here set forth the two sections therein which are immediately under review on this appeal.

190.—Where a company is being wound up by the court, the court may on the application of the liquidator by order direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator by his official name, and thereupon the property to which the order relates shall vest accordingly, and the liquidator may, after giving such indemnity, if any, as the court may direct, bring or defend in his official name any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.

191 (1).—The liquidator in a winding up by the court shall have power with the sanction either of the court or of the committee of inspection—

(*a*) To bring or defend any action or other legal proceeding in the name and on behalf of the company.

I may recall, my Lords, the fact that the winding up order in this case was made by reference to sect. 338 (1) (*d*) (i) of the Act of 1929 as just cited. It was made because, in the opinion of the learned judge, the Bank was a company " dissolved " within the meaning of the subsection.

Now it had clearly been the expectation of EVE, J. that any winding

up petition in relation to the Bank would be based upon sect. 338 (2), a subsection first appearing in the Act of 1928, and by its very terms primarily directed, as it would seem, at those Russian banks which, like the appellant Bank, having carried on business in Great Britain had been dissolved in Russia without any settlement of their affairs in this country, made or attempted. And Bennett, J. was invited by the petitioners to make the winding up order under that subsection. But he could not see his way to do so. He preferred to act under the earlier subsection general in its terms which had been part of the code since 1862, the clause having been held to apply to foreign corporations which had carried on business in this country. The new subsection, although expressed in terms which in other respects exactly fitted the case of the Bank, did not extend, in his view, to a company which had ceased to carry on business in Great Britain before the commencement of the Act of 1929. It was confined to a company which had so ceased after that date.

My Lords, I am not prepared, as at present advised, to take so strict a view of the subsection. I can see no reason. in principle, for a line of demarcation so arbitrary : nor am I forgetful, although its effectiveness was thereby held in reserve, that the subsection had appeared in the Act of 1928. It must also be remembered in relation to a measure of pure consolidation like the Act of 1929, that normally the date of its commencement is, subject, of course, to any unambiguous direction in any particular instance, the most irrelevant of dates for any effective purpose.

But it is unnecessary further to pursue this topic. The precise effect and purpose of the subsection may well be the subject of further discussion on some other occasion. But for present purposes it is enough to say that the subsection, free in every respect relevant to the present issue, from any ambiguity whatever remains, whether it be applicable to this Bank or not, a provision of major significance in the determination of this appeal. Its applicability to the Bank is, for present purposes, relatively unimportant because to the validity of the winding up order as actually made, no objection is taken by the respondents. They, of course, are strangers to the winding up and in no way bound by any incompetent procedure. But on this application to stay an action which, but for the winding up, is admittedly unsustainable, they take no objection to the regularity of the liquidation, nor do they question the authority of the learned judge to make the order by which it was constituted.

I mention this specifically because neither in the judgments now under review, nor in the respondents' views as presented to this House have I found it to be either completely recognised or fully faced that the Bank is now in the course of a winding up under the Act the validity of which in every particular is unchallenged.

It is, however, in full recognition of that fact, and on its basis alone that the question now at isssue must be determined: and it may be convenient at once to frame that question in terms of the provisions of the statute itself.

The Bank then duly in liquidation as a dissolved unregistered foreign company has under sect. 338 (1) of the Act become a company to which —irrelevancies excepted "all the provisions of this Act with respect to winding up . . . apply." The Bank again is being wound up as an unregistered company. Accordingly, under sect. 342, it is to be deemed to be a company under the Act to the extent provided by Part X of the Act.

And the effect of these two provisions was ascertained as long ago as 1881, when in the case of *Rudow* v. *Great Britain Mutual Life Assurance Society* (1), it was laid down by SIR GEORGE JESSEL, M.R., BAGGALLAY and LUSH, L.JJ., that to the winding up of unregistered companies all of the provisions of what is now Part V of the Act are applicable other than those only which are expressly excepted while as to the section then standing for sect. 342, it was, said SIR GEORGE JESSEL:

> plainly the meaning of the Act that all the provisions of Part [V] shall apply as much to unregistered companies as to registered companies.

Can it then be effectively denied that under sect. 191 (1) (*a*), one of the provisions of the Act "with respect to winding up" the Bank is a company in whose name and on whose behalf its liquidator is thereby empowered with the leave or authority specified to bring or defend any action or other legal proceeding. That, I take it, is the question now to be answered, couched in terms justified by the actual words of the statute. In proceeding to an answer I will, for convenience of statement, refer to the sections of the existing Act of 1929 as if they included the corresponding sections of the repealed Acts which as such have disappeared in the process of consolidation.

And, my Lords, it is noticeable that the precise relation in which the different classes of unregistered companies, in course of winding up under Part X of the Act stand to sect. 191 (1) of Part V is in the present Act less clearly defined than it was in the Consolidation Act of 1908 now superseded.

In what was the Part X of the Act of 1862 (sect. 203) consolidated in the form of sect. 272 in the Part X (Part VIII) of the Act of 1908, retained in the code by the Act of 1928, but for some reason omitted from Part X of the Act of 1929, there was a section which notwithstanding its similarity to sect. 190 of the present Act already set forth, I will transcribe in full in order that the significance of its provisions, set in Part X, when contrasted with the terms of sect. 190 set in Part V

may be conveniently appreciated. The section as it remained in the Act of 1908 was as follows :

272. If an unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the court may by the winding up order, or by any subsequent order, direct that all or any part of the property, real and personal (including things in action) belonging to the company, or to trustees on its behalf is to vest in the liquidator by his official name and thereupon the property or the part thereof specified in the order shall vest accordingly ; and the liquidator may, after giving such indemnity (if any) as the court may direct bring or defend in his official name any action or other legal proceeding relating to that property, or necessary to be brought or defended for the purposes of effectually winding up the company and recovering its property.

Now the Act of 1928 by which this section was retained in the code also introduced as a section of general application in a winding up by the court what is now found in the Act of 1929 as sect. 190. But as has been said the old sect. 272 is omitted from Part X of that Act altogether. Presumably it was supposed that its omission, with sect. 190 retained, made no alteration in the result reached. Perhaps that is true. But the result reached is less obvious than it was. For with the old section in its place operative only but expressly in the winding up of unregistered companies and applicable particularly only to such of these as had no power to sue or be sued in a common name, the section achieved two notable ends : (1) with sect. 191 (1) already on construction made applicable, it definitely excluded from its scope any unregistered company in liquidation which could not sue or be sued in a common name ; (2) it indicated with no less definiteness that section as providing the means by which an unregistered company in liquidation which could so sue and be sued might "recover its property." It was made to appear by sect. 272 that for that purpose in the case of such a company, no vesting order was necessary or even appropriate. And this was the position from 1862 to 1929. During all these years there was no sect. 190. The fact that effectively since 1929, in the compulsory winding up of the Bank as in that of any company under the Act, sect. 190 may now be utilised has not the effect of making sect. 191 less applicable to the Bank than it was. Rather does it appear to me to indicate that if sect. 190 in Part V now applies to the Bank, so also must sect. 191 (1) in the same part apply as well. For I am quite unable to understand the view favoured below that the Bank may at one and the same moment for the purposes of sect. 190 be a company with property belonging to it or held by trustees on its behalf, while for the purposes of sect. 191 (1) it is a company without a name ; there being "no company on behalf of which the action can be brought," to quote again the words of Slesser, L.J., already cited.

But, my Lords, the necessarily close connection between unregistered companies like the Bank and sect. 191 if their liquidation is to be effective,

is perhaps even more clearly disclosed by a comparison between the "dissolution" which under Part X is a ground for the winding up of an unregistered company, and the dissolution of a registered company elsewhere provided for in the Act. The contrast is at once arresting and illuminating. In the case of a registered company which has been wound up by the court, it is by sect. 221 provided that, "when the affairs of the company have been completely wound up" the court is to make an order that the company be dissolved: In the case of a voluntary winding up, it is by sect. 236 provided that "as soon as the affairs of the company are fully wound up" the liquidator is to make up an account, convene a meeting of contributories, make to the registrar a report and return as specified in the section and by subsect. 3 it is provided that on the expiration of three months from the registration of the return the company shall be deemed to be dissolved.

Now these provisions are as old as the Act of 1862: and as long ago as in 1878 in *Re London & Caledonian Marine Insurance Co.* (2), following *Re Pinto Silver Mining Co.* (3), it was held by the Court of Appeal that the court had no jurisdiction to make an order for winding up a company which had been voluntarily wound up and dissolved under the sections of the Act above stated unless the dissolution could be impeached on the ground of fraud. After dissolution there was no company as COTTON, L.J., observed in the first case.

And to these provisions on this subject no additions were made until the Act of 1880, when the registrar was given power to strike defunct companies off the register—a power now found in sect. 295. Sect. 294 conferring power on the court to declare the dissolution of a company to be void did not come until 1907.

These sections which deal, of course, only with companies formed and registered under the Act, do not in either case contemplate a new winding up order: sect. 294 apparently contemplates the continuance of the liquidation prematurely stayed by the dissolution declared void, sect. 295 provides for the restoration to the register of the defunct company. It is, however, interesting to note the form of words used to describe the result achieved in each case. Under sect. 294 the proceedings to be taken after order is made are to be "such as might have been taken if the company had not been dissolved": and by sect. 295 (6) after a company which had been struck off the register has by order of the court been restored, it is provided that after the procedure prescribed "the company shall be deemed to have continued in existence as if its name had not been struck off."

We may find a striking analogue to these provisions in Part X, to which we now proceed. And how striking is the contrast there presented between a "dissolution" as just described and the "dissolution" of the unregistered company now envisaged. The first dissolution—a

complete bar to a winding up order—now becomes the occasion for such an order. No longer is there no company, no debts, no property, nothing to wind up. One of the occasions of the order authorised by Part X is that the company is unable to pay its debts: another, that it is just and equitable that the company should be wound up: under sect. 338 (2) the unregistered company there described may be wound up notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated—a complete contrast.

My Lords, these extracts to my mind disclose at once the legislative purpose underlying Part X and the manner in which in relation to so-called dissolved companies that purpose is given effect. Take a company described in sect. 338 (2). That company, although in terms stated to be non-existent in the country of its incorporation, is not only a company which may be wound up, but on an order for winding it up made, it is by sect. 342 to be deemed to be a company under the Act, not, be it observed, a "dissolved" company under the Act: there is, as Cotton, L.J., observed, no such thing. Following Sir George Jessel's terminology, it is to be deemed to be a registered company: adapting the phraseology of the Act already alluded to and equivalent in effect, it is to be treated as if it were a company which had not been dissolved. And it is not denied that it was within the competence of the legislature so to enact: the only question is whether it has in substance done so. My Lords, I cannot doubt that it has. The Act in regard to these companies is dealing with organisations which, as such, are beyond the control of Parliament. It is not for the legislature of this country either to kill or to make them alive. In this vital respect they stand in a totally different position from the companies under the Act whose dissolution the Act has brought about and whose dissolution it has also declared void. All that with reference to the dissolution of a foreign corporation the legislature can say is that it shall be ignored in a winding up of the company under the Act. And it is ignored because any dissolution without a winding up previously completed and with creditors unpaid is an offence, an injustice, to these creditors if it be permitted to defeat their claims against the company. Therefore such a dissolution is to be ignored.

And reading sects. 338 (2) and 342 together, I cannot doubt that in express terms the legislature has done so in that case—creating a situation the full benefit of which can be extended to the liquidation of the Bank as a dissolved foreign corporation: thus rescuing from sterility a winding up by statute directly authorised.

My Lords, having reached this conclusion I need go no further. It follows from what I have said that in my judgment the Bank—deemed by the statute to be a company under the Act—is a proper plaintiff in

the present action. I have had the advantage of reading the judgment which my noble and learned friend LORD ATKIN has prepared. I desire to say that I am in entire agreement with the broad grounds on which he bases his conclusion and I concur in the motion, allowing the appeal which will be made in his name. I would only add, by way of a general observation, that any difficulties in this liquidation will, I doubt not, be met as they arise. It will be open to the court completely to control the liquidator at every step. In the present action the court will doubtless be vigilant to see that no order possibly affecting either the Attorney-General on behalf of the Crown or the Soviet Government is made without due notice to each, while by an order staying proceedings after the main purpose of the liquidation has been effected the Bank under sect. 342 will cease even to be deemed to be a company under the Act.

LORD ATKIN [read by LORD ALNESS]: My Lords, the question is whether the liquidator appointed after the appellant Bank had been ordered to be wound up may use the name of the Bank to sue to recover an alleged debt of £180,000, said to be due from the defendants. The alleged debt is said to have arisen in respect of purchases made for the former Russian Government during the war and paid for by the Bank. The Russian Government is said to have reimbursed the Bank by orders upon the defendants who held an account for the Government in London. The present Russian Government makes no claim to the money. It is said, however, by the defendants, that the Bank was a Russian corporation which was dissolved by Russian law in or about 1918, and therefore it cannot sue. Apart from the provisions of the Companies Act and the existence of a winding up order, there can be no doubt that this contention would prevail. The question is whether those factors alter the position. The appellant Bank is one of several similar institutions incorporated in Russia and carrying on business by a branch or branches in this country. Their legal position has been the subject of much litigation. They all seem to have carried on business in this country for some considerable period after the Russian revolution: and for a time it was in doubt whether the effect of the new legislation was to dissolve the corporations altogether, or merely to deprive it of its property leaving the juristic person in existence. After decisions either way depending upon the varying evidence of fact as to the effect of the Russian laws, it was eventually determined apparently beyond further dispute in about 1931 that the corporations were in fact dissolved in Russia. The material date is said to be some time in the year 1918. The resulting position was embarrassing. There were what appeared to be assets in this country, some doubtless acquired during the period of trading by the nonentity: there were creditors of the pre-dissolution and post-dissolution period. The obvious course was to wind up the companies if that could be done. By the Companies Act,

1862, s. 199, there was power to wind up unregistered companies "whenever the company is dissolved or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs." Under this provision it was accepted law that the courts could order a winding up of a company incorporated abroad which had carried on business in this country. But there had been no decision as to the power to wind up an incorporated company which had in fact been dissolved, though there may have been a very occasional order made in such case without any direct notice of the point. It was in these circumstances and I have no doubt with direct reference to the difficulties as to the Russian banks disclosed by the litigation to which I have referred that the legislature in the Companies Act, 1928, an amending Act, sect. 91, provided:

> Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company . . . notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.

The section is now found in the Companies Act, 1929, the consolidation Act, in Part X, entitled winding up of unregistered companies, as sect. 338 (2). Sect. 338 (1) enacts:

> Subject to the provisions of this part of this Act, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company . . .

Subsect. (1) (*d*) repeating the provisions of the Act of 1862, s. 199, and the similar sect. 268 of the Act of 1908 provides:

> (*d*) the circumstances in which an unregistered company may be wound up are as follows:—(i) if the company is dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs.

I for myself come to the conclusion that sect. 91 was introduced into the Act of 1929 for the removing of doubts and to make it clear that the words "if the company is dissolved" were meant to apply to an incorporated company dissolved according to the law of its constitution: and not intended to give a new enabling power only applicable to a company which should cease to carry on business after the passing of the Act. Such a construction would in fact in reference to the Russian banks have defeated the immediate object of the legislature. What then is the effect of a winding up order made in pursuance of sect. 338 of a foreign incorporated company which has been dissolved and ceased to exist under the laws of its own country? It is said by the respondents and the view has found favour in the courts below that the company having at one time ceased to exist continues non-existent: that there are no words in the Act which bring it back to life, and that though

you order the company to be wound up, there is in fact no company in existence, and the winding up whatever it means must proceed on that footing. Now the effect of a winding up of a company under Part V of the Act, provisions which it has been noted expressly apply to the winding up of an unregistered company, is that a liquidator is appointed whose duty it is to take possession of the assets of the company, ascertain the debts in accordance with the provisions as to proof of debts contained in Part V (v) of the Act, and discharge the debts so far as the assets permit. But on the respondents' assumption three results emerge: (1) There is no company to be wound up. (2) There are no assets of the company. (3) There are no debts of the company.

1. I need say little about the existence of the company. It seems to me that all the provisions of the Companies Act relating to winding up assume that there is a company in existence, the process of winding up is one of operating upon an existing thing so as to dispose of its assets and obligations, and eventually bring it to an end. The powers given to the liquidator under sect. 191 seem to have no meaning except upon the footing that a company is in existence. One may note for instance sect. 191 (2) (*d*) power to draw, accept, etc., any bill of exchange in the name and on behalf of the company "with the same effect with respect to the liability of the company as if the bill had been drawn, accepted, etc., by or on behalf of the company in the course of its business." It is the company which is being wound up, not the affairs of the company, *e.g.* sect. 191 (2) (*h*) the liquidator in a winding up by this court of the company has express power to do all things necessary "for winding up the affairs of the company and distributing the assets."

2. Every section of the Act which deals with property in a winding up treats and describes the property as property of the company. I need only refer to sects. 189 and 191 (2) (*a*). As is well known, the scheme of a winding up is that no property is vested in the liquidator, unless a special order is made under sect. 190 to which I will refer later. The liquidator deals with the company's property in right of the company or usually in the name of the company, possessing the powers of the directors and the special statutory powers given to him by the Act. On the assumption adopted by the judgments under appeal not only is there no property of the company in existence with the result that none of the statutory powers of the liquidator in respect of property come into existence, but there is the further difficulty that all that which had been the moveable property of the company has become vested in the Crown as *bona vacantia*.

For some reason which I cannot appreciate some of the learned judges in the courts below seem to have thought that this obvious difficulty might be cured by obtaining a vesting order under sect. 190. But when that section is looked at, the power of the court is found to be to "direct

that all or any part of the property of whatsoever description belonging to the company . . . shall vest in the liquidator by his official name." The initial futility remains. 1. There is no property belonging to the company. 2. What has been the property of the company now belongs to a third person, the Crown, and there is no power to vest the property of a third person in the liquidator. The result is that if the company for the purposes of winding up is to be treated as dissolved, there never can be any assets over which the liquidator can exercise any powers of any kind. On the assumption I prefer to adopt, the Crown acquired a defeasible title defeated upon the making of a winding up order.

3. The same reasoning applies to debts affecting the provisions in sect. 264 of preferential payments of certain debts made as rates, taxes, wages of clerks or servants, workmen and labourers, amounts due for workmen's compensation and the like. It is, I think, clearly established that if the debtor becomes non-existent, the debt is at an end.

It is unfortunate that this aspect of the case does not seem to have been brought to the attention of the courts below; for they would have found that their attempted solution by means of a vesting order would have left the liquidator still stranded; for there would be no debtors amongst whom to distribute the supposed vested assets.

> The debts of a corporation either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover or be charged with them, in their natural capacities; agreeable to that maxim of the civil law *si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent.*

cited from 1 Bl. Com. 484 by R. S. Wright, J., in *Re Higginson and Dean, Ex p. A.-G.* (4), at p. 330. I do not share the doubts of the learned judge in that case that Blackstone's proposition may mean no more than that the individual corporators are no longer liable. The principle is stated absolutely: and clearly if the corporators are not liable, there is no one else who could be liable.

What is the result: The legislature has provided that a dissolved foreign corporation may be wound up in accordance with the provisions of the Companies Act. The provisions of the Companies Act as to winding up are only applicable to corporations which are in existence. Are we to say that the legislative enactment is completely futile: or is there another solution? My Lords, I think that we are entitled to imply indeed I think it is a necessary implication, that the dissolved foreign company is to be wound up as though it had not been dissolved and therefore continued in existence. This seems to me with respect the necessary result of saying that it shall be wound up in accordance with the provisions of the Act. There is nothing abnormal in such a provision. The municipal law of this country as of other countries accepts the principle of international law that countries ordinarily accept the existence of juristic persons brought into being or recognised

as existing in their country of origin. Similarly they accept the destruction or cessation of such a juristic personality under the law of its country of origin. But if the municipal law choose, it may in defined conditions refuse to accept or may accept only under conditions either the creation or destruction of a foreign juristic person: whether it has done so is for the municipal court to decide, but if it has then the municipal court must accept the situation. I see nothing incongruous in the legislature saying in effect, we accept the existence of a foreign corporation coming to trade in this country; we shall only impose a condition of registration. But if the corporation does trade here, acquires assets here, and incurs debts here, we shall not accept its dissolution abroad without a stipulation that if desirable it may be wound up here so that its assets here shall be distributed amongst its creditors (I do not stay to consider whether its English creditors or creditors generally) and for the purpose of the winding up it shall be deemed not to have been dissolved: for that event would defeat our municipal provisions for winding up a corporation. This does not appear to me to be re-creating or reconstituting a new corporation: it is for particular and limited purposes refusing to recognise the dissolution of the old. The analogy is to this provision of sect. 295 (6) which provides that where a defunct company has been struck off the register by the registrar and after publication of that fact in the Gazette has been dissolved the court may restore the companies' name to the register at any time within 20 years and "the company shall be deemed to have continued in existence as if its name had not been struck off."

With great respect to those who tnink otherwise I cannot think that it is a preferable solution to suppose that the company is still non-existent but that the winding up is of the affairs of the company and that the liquidator of the affairs of the company is to have recourse to what would have been the assets of the corporation if it had not been dissolved, and to distribute them amongst those who would have been creditors in the same circumstances. Nor is it any easier to confine the distribution to assets existing at the date of the dissolution amongst creditors in existence at the same date. The latter proposal, indeed, seems to accentuate difficulties in the case of a bank trading after dissolution and daily changing its assets and liabilities. What happens to interest accruing after dissolution? But to neither view do I find it possible to apply the terms of the statutory duties of a liquidator. I suggest that you cannot distribute the value of non-existent rights amongst the owners of non-existent obligations: and that you must subsume for the rights and obligations a juristic person who possesses the one and is subject to the other.

It is unnecessary to discuss the terms of the Companies Act dealing with unregistered companies other than corporations, including certain

partnerships: it is obvious that the word "dissolution" in connection with them has quite a different connotation. Rights and obligations still remain attributable to continuing juristic persons, and none of the present difficulties exist.

Everyone must be conscious that the interpretation of sect. 338 as applied to foreign dissolved corporations presents difficulties: and one may wish that the legislature had worked out the solution itself. But the construction which I have felt bound to adopt seems to provide the only means for securing an effective winding up: and also a principle upon which future problems in the course of liquidation may eventually be solved. I might add that if the company continues to exist for the purpose of winding up I find no difficulty in holding that such assumption is valid for the purpose of validating as a creditor of the company a person who on that assumption presents the petition for the purpose of winding up.

In the result it appears to me that the order for winding up having been validly made, the order under sect. 191 permitting the liquidator to bring this action in the name and on behalf of the company was rightly made, and the action so brought was properly constituted. I am of opinion that this appeal should be allowed: that the order of Clauson, J., dated Oct. 9, 1934, and the order of the Court of Appeal, dated Nov. 20, 1934, should be set aside: and that the defendants should pay the costs here and in the court below.

Lord Russell of Killowen: My Lords, The exact point which we have to determine may, I think, be stated thus: does the Companies Act, 1929, enact that if an order is made under sect. 338 for the winding up of a foreign corporation which has been dissolved (and has therefore ceased to exist), according to the law of the country of its creation, that corporation may sue as plaintiff in an action instituted in the courts here? Does the Act provide that the corporation may sue notwithstanding that it has ceased to exist, or that the corporation shall spring into existence once more, or (what is in effect the same thing), that it shall be deemed to be in existence?

The dissolution of a corporation, when that corporation is a company registered under the Act, and its restoration to life, are matters which are dealt with in sections specifically framed for that purpose. Thus sects. 221, 236 and 245 provide for the dissolution of such a company on the completion of a winding up by the court, a member's voluntary winding up, and a creditor's voluntary winding up respectively: and sect. 295 empowers the registrar of companies under certain conditions to take certain steps which include the striking the name of the company concerned off the register, and which result in the company's dissolution. The legislature, however, recognises on the one hand that cases may arise where the dissolution of the company may operate prejudicially

to others, and on the other hand that it is impossible to work justice without re-creating the existence of the dissolved corporation. Sect. 294 accordingly gives a power to the court, within a limited period, to make an order—I quote the words of the section :

> upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

Sect. 295 (6) gives a power to the court, within a limited period, to order the name of the company to be restored to the register and the sub-section provides that :

> upon an office copy of the order being delivered to the registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off ; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

Finally, sect. 296 provides that where a company is dissolved its property shall, subject and without prejudice to any order which may at any time be made by the court under sects. 294 and 295 be deemed to be *bona vacantia*.

My Lords, I refer to these sections for the purpose of showing that the legislature was fully alive to the necessity of bringing into existence once more a dissolved corporation, before any rights could be asserted by or against it ; and had in express terms made specific provision for that purpose by giving the court power (in the one case) to declare the dissolution to have been void, and (in the other case) to restore the name to the register with the result that the company's existence is deemed to have continued throughout ; but always with power to insert special provisions in the order, in order to meet the requirements of each particular case.

The importance of these considerations lies in the fact that the appellants contend that this Act also provides for the bringing into existence once more of the dissolved foreign corporation which is ordered to be wound up under sect. 338, or for its possessing and enforcing rights notwithstanding its dissolution. There is admittedly no provision in the Act which in express words purports to do this. The argument is that in the case of a dissolved foreign corporation such a provision is to be implied. In order, however, to justify us in holding that any such legislation by implication has taken place, two conditions must, I conceive, be fulfilled : the provision to be implied must be a provision whose existence is necessary in order to give effective operation to what has been expressly enacted ; and the provision to be implied must be capable of clear and certain definition.

I now turn to a consideration of sect. 338. It is to be observed in the first place that it is a section which deals with all unregistered companies as defined in the Act. It includes, therefore, countless cases of partnerships, associations and companies which are merely names for groups of individuals, and which are not corporations at all. The case of a foreign corporation incorporated by foreign law, though covered by the language used, is not referred to in terms in subsect. 1. It is referred to expressly in the second subsection, a provision which appeared in company legislation for the first time in 1928. The section, therefore, applies to a vast number of cases in which no question can arise as to cesser of the existence of the unregistered company; in which, in other words, the dissolution referred to in subsect. (1) does not involve the extinction of rights and liabilities, all of which continue vested in and binding upon the individuals composing the unregistered company. Part X, in short, is dealing with unregistered companies, and only incidentally with corporations which have been dissolved. It is essential to bear this in mind when examining the provision from which the alleged implied legislation is said to flow. This provision consists of the words in subsect. (1), "and all the provisions of this Act with respect to winding up shall apply to an unregistered company." Let me state the argument. The Act says that all the provisions of Part V shall apply; therefore sect. 191, which is one of those provisions, applies; but sect. 191 includes a power to the liquidator of a company registered under the Act to bring an action in the name of the company; therefore the liquidator can bring an action in the name of the unregistered company; therefore the Act has enacted that the dissolved foreign corporation can sue as plaintiff.

If the words which I have quoted above have this effect one is entitled to know how the matter stands. Has the statute enacted that a non-existent person may nevertheless sue as a plaintiff, be a party to litigation, and perhaps recover judgment or be ordered to pay costs? Or has the statute enacted that the corporation shall be restored to life, and if so is it restored to life as a corporation constituted by Russian law or by English law, and who are the corporators; and is it resuscitated only as from the date of the winding up order, or retrospectively as from the moment of its dissolution? These are questions which it seems to me must be capable of being answered from a perusal of other parts of the Act before you can make the required implication. For myself I cannot find the answer anywhere; it certainly cannot be found in the power given to the liquidator to sue in the name of the company, for a general power of that nature, applicable in the great number of cases to unregistered companies which though dissolved in one sense have not ceased to exist, cannot *per se* amount to an enactment that a non-existent person may sue, or that a non-existent person is to be made to

live again, or is it be deemed never to have died. The provision here sought to be implied is incapable of clear and certain definition.

Nor, in my opinion, can the existence of the provision which is sought to be implied, be said to be necessary in order to give effective operation to what is expressly enacted. The winding up of a company is not the same thing as the dissolution of a company. A company is wound up when its affairs are wound up; and its affairs are wound up by getting in such assets as can be got in, and paying therewith such debts as are ascertainable, and disposing of the surplus (if any) to those entitled thereto. The application of sect. 338 to the case of a dissolved foreign corporation is no doubt on any view of the present appeal full of difficulties. Many of the provisions contained in Part V cannot, if read strictly, apply to such a case. Thus, strictly speaking, there could not be a petition presented by a creditor; there are no creditors of a dissolved company. Nor could a list of contributories be settled. Nor are there any assets of a dissolved company. When sect. 338 enacts that all the provisions of Part V shall apply to an unregistered company, it cannot mean that every provision of Part V shall apply to every unregistered company which is ordered to be wound up. For instance, many provisions are incapable of application to the case of a partnership which is an unregistered company within the meaning of Part X. The words must surely be read with some qualification, and I suggest that they simply mean that the provisions of Part V shall apply so far as capable of application; and even then a somewhat artificial meaning must be given to some of the language used, when it is sought to apply them to the case of the winding up of a dissolved foreign corporation. Thus "property" and "assets" must refer to what would have been property or assets of the corporation if it had not been dissolved; and so with "creditors" and "debts."

So reading the Act in relation to dissolved foreign corporations I can find no basis to support the suggested implication.

What are the facts of the present case? A Russian corporation, owing its existence to Russian law, an English translation of whose name or description appears to be "Russian and English Bank," was dissolved and ceased to exist 17 years ago. The property which it owned in this country thereupon became the property of the Crown. After the lapse of some 14 or 15 years an order is made under sect. 338. Upon the happening of that event, it is alleged, the Act, which contains express and carefully framed provisions for resuscitating dissolved companies which were registered under the Act, enacts, without any express words at all but merely by implication, that dissolved foreign corporations are to arise from the grave in full life and vigour, and entitled to sue to recover property which for 14 or 15 years has been the property of the

Crown: or that they are to be so entitled notwithstanding that they do not exist.

My Lords, I confess frankly that I find myself unequal to the task of assenting to this view. It appears to me to be legislation pure and simple. It may well be that had the difficulties incident to the winding up of dissolved foreign corporations been considered in greater detail, express provisions could have been inserted for the purpose of dealing with those difficulties. That, however, is supplementary matter for the legislature, not for us, to provide. Upon the construction of the Act as it is framed, I find myself in agreement with the views expressed by Bennett and Clauson, JJ., and Slesser and Roche, L.JJ., viz., that the plaintiff in the present action remains, notwithstanding the winding up order, a non-existent person and cannot sue. The defendants are in effect being sued by an English translation of the name of a dissolved Russian corporation—a *nominis umbra* indeed.

Sect. 190, if read as to dissolved foreign corporations in the artificial light indicated above, may with the assent of the Crown provide a means by which the liquidator can obtain relief, but it would then be by means of an action in which he personally would be the plaintiff. I express, however, no concluded opinion as to this, neither do I care to express a concluded opinion upon the question whether sect. 338 (2) would have been applicable to this corporation. My present opinion is in favour of the view that the subsection would have applied.

For the reasons which I have indicated I would dismiss this appeal.

Lord Macmillan: My Lords, the Russian and English Bank, a company incorporated in Russia which had carried on business in Great Britain, was dissolved under Russian law (as was agreed for the purposes of this case) in December, 1918, and thereupon ceased to exist. On Mar. 8, 1932, Bennett, J., on the petition of three persons claiming to be creditors, made an order for the compulsory winding up of the Bank under the Companies Act, 1929. The order was made after hearing the Attorney-General, who appeared in the proceedings on behalf of His Majesty to assist the court and receive an award of costs out of the assets. The validity of this order is not in question. It was made in pursuance of the powers conferred by the Companies Act, 1929, s. 338 (1), which authorises the compulsory winding up of an unregistered company in certain enumerated circumstances, of which the first is "if the company is dissolved." The Russian and English Bank complied with these requirements; it was an unregistered company within the statutory meaning and it had been dissolved.

By the winding up order one of the official receivers was appointed provisional liquidator, and on his application an order was made by the Registrar on July 20, 1932, appointing a chartered accountant to be liquidator of the company and certain persons, described respectively

as creditors and contributories of the company, to be a committee of inspection. It appears from the registrar's order that he had before him two reports by the official receiver of the results of meetings of creditors and contributories of the company, both dated June 27, 1932.

On Dec. 20, 1932, the registrar, on the application of the liquidator, made an order that the liquidator should be at liberty to commence and prosecute an action in the Chancery Division in the name of the Russian and English Bank against the present respondents and His Majesty's Attorney-General for certain relief as set out in the order. On June 6, 1933, a writ was accordingly issued at the instance of the Russian and English Bank against the present respondents. The effective claim in the action is for recovery of two large sums of money held by the respondents and alleged to belong to the company.

The respondents thereupon took out a summons in which they made application "that all further proceedings in this action may be stayed on the ground that the plaintiff Bank is a dissolved corporation." On the matter coming before CLAUSON, J., this application was granted and the solicitor by whom the writ had been issued was ordered to pay the costs of the respondents. The Court of Appeal (SLESSER and ROCHE, L.JJ.) affirmed the decision of CLAUSON, J. The ground of judgment in both courts, put shortly, was that a non-existent plaintiff could not sue.

My Lords, I am of opinion that the objection which has been taken to the title to sue of the Russian and English Bank and which has been sustained by the courts below is not well-founded. The legislature has expressly enacted in the Companies Act, 1929, s. 338, that a dissolved, that is to say, a non-existent, company may be the subject of a compulsory winding up order. In addition to sect. 338 (1) (*d*) under which the present winding up order was made, I may refer to subsect. (2) which enacts that

> where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under this part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.

BENNETT, J., took the view that this subsection was inapplicable to the present case because the Russian and English Bank had ceased to carry on business in Great Britain before the Act of 1929 came into operation. Be that as it may, it is manifest that the legislature has not been deterred by the fact that a company has ceased to exist from authorising it to be wound up.

Now the purpose of pronouncing a winding up order is to secure the collection and distribution of the assets of the company to which it relates. The logical inquirer may ask how a company which has ceased

to exist can have any assets. But when the legislature authorised the making of a winding up order in the case of a dissolved company, it must be presumed to have intended such order to be effective and to result in the collection and distribution of assets. To hold that the legislature has authorised the collection of the assets of a dissolved company, but has withheld the power of recovering these assets would be to attribute a singular ineptitude to Parliament. It is necessary, therefore, to see what powers have been conferred in the matter.

The opening words of sect. 338 are quite definite. After authorising the winding up of an unregistered company (which includes a dissolved unregistered company) the section enacts that

> all the provisions of this Act with respect to winding up shall apply to an unregistered company

with certain exceptions which for the present purpose are immaterial. Turning to the part of the Act relating to winding up, I find in sect. 191 that

> the liquidator in a winding up by the court shall have power with the sanction either of the court or of the committee of inspection—(*a*) to bring or defend any action or other legal proceeding in the name and on behalf of the company.

The matter is not left to implication. Here is direct legislative warrant for what has been done in the present case. I am at a loss to understand how it can be said that in order to reach the conclusion that the present action has been competently brought at the instance of the Russian and English Bank I must commit the indiscretion of quitting the judicial sphere and trespassing on the legislative domain. To me it seems clear that the legislature has in terms authorised this very procedure.

Recognising that the legislature must have meant the process of liquidating a dissolved company to have some practical effect, the learned judges below have suggested that it may be possible to utilise sect. 190, though not sect. 191. But why should sect. 190 be held to be available and sect. 191 not? Sect. 190 presents a difficulty different from, but just as embarrassing to the purist as, sect. 191, for it authorises the pronouncement of an order vesting in the liquidator all or any part of the property belonging to a company which is being wound up. As I have already pointed out, a company which is non-existent cannot have any property. If, as is suggested, the legislature has authorised the making of an order vesting non-existent property in the liquidator, it does not seem to me more extravagant that it should have permitted a non-existent company to sue. A legal system which for so long admitted as suitors in its courts those wholly fictitious persons John Doe and Richard Roe, who were in much worse case than the Russian and English Bank, for they never existed at all, might be expected to suffer with equanimity

the apparition, at the bidding of the legislature, of a dissolved company as a plaintiff.

The truth is that the whole procedure is highly artificial. Once it is conceded, as it must be, that a non-existent company may be the subject of a winding up order, it is inevitable that anomalous consequences must ensue, some of which may not have been foreseen by the legislature. The procedural difficulties in the way of adapting the normal winding up machinery to the abnormal case of companies already dissolved are undoubtedly formidable, but I venture to think that they are more logical than real. Thus it has apparently not proved impracticable to hold meetings of creditors and contributories of this dissolved company for, as I have mentioned above, the official receiver reported that such meetings had been held. At any rate, these difficulties must be faced and surmounted as best they may be for the legislature has enacted that dissolved companies may be wound up. The present difficulty, if it be one, is only one of many, and to my mind is less formidable than others which must be encountered if the legislation is to be effective. It is after all only a matter of mechanism, and I do not think that it is either necessary or profitable to discuss problems as to the precise legal status of a dissolved company which has been ordered to be wound up. In this connection metaphors may easily be misleading and serve only to create their own puzzles. Reference has been made to sects. 294 to 296 of the Act which *inter alia* provide the means for declaring the dissolution of a company to be void and for restoring dissolved companies to the register. These sections, however, relate only to companies registered in this country, and do not throw light on the present question. The provisions of sect. 296 as to the property of a dissolved company becoming *bona vacantia* are, in my view, inapplicable to the Russian and English Bank. But if the assets of the Bank on its dissolution become *bona vacantia*, either at common law or by statute, the Attorney-General on behalf of the Crown was present when the winding up order was pronounced, and in acquiescing in that order he must be taken to have had in view all its consequences, including the consequence that it would involve the effective collection and distribution of the assets which belonged to the company.

I accordingly concur in the motion that this appeal be allowed, the orders of the Court of Appeal and CLAUSON, J., be reversed, the stay of proceedings be recalled, and the action be allowed to proceed at the instance of the Russian and English Bank.

LORD MAUGHAM (read by LORD RUSSELL OF KILLOWEN): My Lords, the single question on this appeal is whether the courts below were right in staying all further proceedings in the action on the ground that the apparent plaintiff, the Russian and English Bank, is a dissolved corporation and therefore not a legal *persona* capable of suing. It is not in

dispute that the Russian and English Bank was incorporated in the year 1910 in Petrograd under Russian law, that in 1915 a branch of the Bank was established in London and further that that corporation was dissolved as the result of Russian legislation in or about the year 1918 and thereupon ceased to be a legal entity. I do not think it can be doubted that the dictum of Scrutton, L.J., in the *Banque Internationale de Commerce de Petrograd* v. *Goukassow* (5), at page 691, is correct. He stated that :

> If the artificial person is destroyed in its country of origin, the country whose law creates it as a person, it appears to me it is destroyed everywhere as a person.

Accordingly an action in the name of the Bank against the present appellants started in 1921 was properly stayed by Eve, J., on that ground. It is, however, asserted that the whole position was changed when on Mar. 8, 1932, an order was made by Bennett, J., for the winding up of the company, and the appointment of a liquidator ; for it was contended, as I understood the argument, that the words " Russian and English Bank " in the title to the action now properly describe a corporation which is entitled to sue in this country—a result which is ascribed to the effect of a winding up order made pursuant to the Companies Act, 1929, s. 338 (1) (*d*). There appears, however, to be an alternative view held by at least one of your Lordships that the words in the title do not indicate a real corporation at all, but a *nominis umbra*—as much a fiction as our old friends John Doe and Richard Roe, who were abolished by the Common Law Procedure Act, 1852.

There is, in my opinion, no doubt as to the power of the court to wind up a foreign company, although it has been dissolved in its country of origin. Such a company is an " unregistered company " within the meaning of sect. 337, and one of the circumstances in which such a company may be wound up is that it " is dissolved." It follows as a necessary consequence that the dissolved company may properly be described in the petition to wind up by the name which it originally bore, and that a person who was a creditor of the company at the time of its dissolution is entitled to present the petition. No doubt these are curious consequences of the section, and one might wish that the difficulties had been further considered and had been met by express provisions ; but the consequences are in my view entirely necessary if the section was to have, as regards a dissolved company, any meaning at all. The serious and important question remains, can the company though dissolved sue in its own name ? The appellants' contention that it can is based on the combined effect of sect. 338 (1) and sect. 191 of the Act. It is said that the former section makes the latter section applicable to an unregistered company and accordingly that the liquidator has power with the sanction of the court (which has been obtained) " to bring or defend any action or other legal proceeding in the name and on behalf of the company."

My Lords, but for the opinions some of your Lordships have expressed, I should have had no hesitation in agreeing with the judgments of CLAUSON, J., and of SLESSER and ROCHE, L.JJ., on this question. A power "to bring or defend an action" in the name of the company is, I think. only a power conferred in respect of a company which is in juridical existence. For instance, sect. 191 (1) (*a*) does not in my opinion authorise a liquidator to use the names of a number of partners in a foreign partnership either for the purposes of offence or defence, although this "association" is an unregistered company within sect. 337. Nor is there any ground, still less any authority, for thinking that an English company registered under the Act, but dissolved pursuant to sect. 294 or sect. 295, can sue after a winding up order unless the dissolution has been declared void under sect. 294 or an order has been made restoring the company to the register with the result that it is "deemed to have continued in existence as if its name had not been struck off" (sect. 295 (6)). The general provision in sect. 338 (1) that "all the provisions of this Act with respect to winding up shall apply to an unregistered company," with certain exceptions, cannot properly be held to mean that every provision of Part V of the Act is applicable to every unregistered company. This is plain from the consideration that many of the provisions are wholly inapplicable to foreign partnerships or associations; and scarcely any of the important provisions as regards contributories can be made to apply to a company with foreign statutes, having its existence by foreign law so that the law of the contract between the contributory and the company must be a foreign law.

My Lords, Russian and English Bank certainly did not exist as a legal entity for some fourteen years after its dissolution. If there is now a legal entity bearing that name it must be a different corporation existing by English law, domiciled in this country, possessing assets, if any, only within the British jurisdiction, and apparently it must be a *quasi*-trading corporation without statutes, or charter or articles of association and without any corporators, unless in some way it may be held that such shareholders, if any, in the original company as may be domiciled in this country, are in some sense corporators of the new corporation. Russian corporators have plainly had their rights and liabilities extinguished. This new company, if it exists, is not in my opinion, "*the* company" pointed to by the language of sect. 191 (1) (*a*). If indeed the original foreign corporation could be the subject of an order declaring "the dissolution to have been void" (as under sect. 294), I could understand the contention of the appellants; but I do not understand it to be suggested that a winding up order here can destroy the effect of legal acts in Russia. That would seem to be contrary to all the principles of international law; and the ingenious suggestion that sect. 338 may authorise the winding up of a dissolved company

"as if it had not been dissolved" is open in my opinion to the same objection. It has been *de facto* legally dissolved, and the phrase if analysed must mean that a new corporation is to spring into existence, upon the making of the winding up order.

It is said that the conclusion at which the courts below have arrived renders it impossible effectively to wind up a foreign dissolved company. I do not agree. Winding up is a business term denoting realisation of such assets as can be collected and the distribution of the proceeds amongst its creditors. The term was derived from suits for the analogous purposes of winding up a partnership (see Palmer's Company Precedents, 14th Edn., Part II, p. 1). Many companies, if not the great majority, are wound up without any action being brought in the name of the company, for the liquidator has no difficulty in obtaining possession of the assets. Moreover, though the question does not arise for decision, I am by no means satisfied that a vesting order might not properly be made under sect. 190, reading that section in the same way as sect. 338 (1) (*d*) must be read in relation to a dissolved company. The peculiar difficulty which would arise from the use of the name of the dissolved company in an action outside the domestic forum does not apply to a vesting order under sect. 190 since that section does not contemplate a proceeding by a dissolved company. However that may be, I cannot think that the fact, if it be a fact, that the liquidator may have considerable difficulty in getting in assets which belonged to the company at the date of dissolution, justifies the view that the section impliedly authorises the creation of a new corporate body.

As regards the alternative view that the liquidator of a dissolved foreign company may commence and prosecute an action in its name though it is non-existent, I will only say that in my opinion the words of sect. 338 do not justify so remarkable a novelty as an action without a plaintiff, nor one so unfair to the defendant and so difficult to reconcile with the Rules of the Supreme Court. The practice in the old ejectment action, though it rested upon a string of fictions, was not unfair to the real defendant; for he had the option either of entering into a rule of court to confess the material fictions, or of putting the plaintiff to the proof of his fictions in which event he would be non-suited. If the action was allowed to proceed and it failed, the lessor of the imaginary plaintiff had to pay the costs, for that was made part of the consent rule. An order for costs against a shadow must needs be a somewhat insubstantial consolation to the successful defendant, even if there be given the usual security for costs.

One other point should be mentioned. It would seem clear that upon the dissolution of the company according to Russian law its chattels in this country, in the absence of any claim to them by the Russian Government, belonged to the Crown as *bona vacantia* (see

Re Higginson and Dean, Ex p. A.-G. (4)). Under sect. 296 (a new section which first appeared in the Act of 1928) the same result would follow, but subject and without prejudice to any order under sect. 294 or sect. 295. Neither of those sections could be invoked in the present case, and it would seem that unless the Crown waives its claim to the assets in question (as in the case of *Re Henderson's Nigel Co. Ltd.* (6)) there will be no assets available for distribution. In the absence of the Crown I do not wish to be taken as expressing a final opinion on this question, but it seems to me to suggest a further difficulty in the way of the nominal plaintiff.

My Lords, for the above reasons I am in favour of dismissing the appeal.

Appeal allowed with costs, including costs in court below.

Solicitors : *F. M. Guedalla & Co.* (for the apellants) ; *Bischoff, Coxe, Bischoff and Thompson* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

ASTOR PROPERTIES LIMITED *v.* TUNBRIDGE WELLS EQUITABLE FRIENDLY SOCIETY

[KING'S BENCH DIVISION (Hawke, J.), **March 11, 1936.**]

Mortgage—Agreement for a loan—Repayment as to the first ten years only agreed—Damages for breach of agreement.

By an agreement contained in letters the defendants undertook to lend the plaintiffs £14,000 to be secured on certain property at Edgware. The repayment was to be at the rate of £70 per quarter for the first ten years and the amount of such repayment was to be reconsidered at the end of that period. The defendants subsequently refused to proceed with the loan. The plaintiffs claimed as special damage the amount of commission paid on arranging a temporary loan and a negotiating fee on arranging the final loan :—

HELD : (i) there was a complete agreement for the loan and the fact that the repayments were to be reconsidered at the end of ten years did not make it an agreement to make an agreement.

(ii) the negotiating fee was not recoverable as special damage in addition to the commission.

[**EDITORIAL NOTE.** The authorities upon the breach of a contract to lend money whether upon security or not are very few and there does not appear to be any previous case where the question has arisen between intending mortgagor and mortgagee. The frequency of such contracts at the present time gives the case additional interest and the consideration of the question of damages is also helpful. No doubt upon default in such a contract a borrower will be forced to obtain both temporary accommodation and also a final mortgage, and it is important to know how far he can throw these additional costs upon the defaulter. Of course, in every case this is a question of what damages were within the contemplation of the parties, and it now appears that there are cases where, upon the facts, the defaulting

party cannot be charged with both a commission for temporary accommodation and a negotiating fee in respect of the final mortgage.

For Damages on a Breach of Contract to Lend Money, see HALSBURY, Hailsham Edn., Vol. 10, p. 121, para. 153, and for the Cases, see DIGEST, Vol. 17, pp. 82, 98, 99, Nos. 25, 131 and 136.]

Cases referred to :

(1) *Von Hatzfeldt-Wildenburg* v. *Alexander*, [1912] 1 Ch. 284 ; 12 Digest 83, *492*.
(2) *Prehn* v. *Royal Bank of Liverpool* (1870), L.R. 5 Exch. 92 ; 17 Digest 98, *131*.

Action for breach of contract.

The plaintiffs claimed that by letter dated Jan. 31, 1935, the defendants as the result of prior negotiations, offered to grant to the plaintiffs a loan of £14,000 to be secured by a first mortgage on a property at Edgware which the plaintiffs were desirous of purchasing. The letter was in the following terms :—

> I have pleasure in confirming our telephone conversation of this afternoon.
>
> The Trustees of the Society have reconsidered your application for a loan and they are prepared to grant a loan of £14,000 on the properties at Grange Hill, Edgware, details of which are contained in the schedule supplied.
>
> The repayment to be at the rate of £70 per quarter for the first ten years. The amount of repayment to be reconsidered at the end of that period.
>
> Kindly let me know, in writing, if you agree to these terms and I will then put the matter in hand.
>
> The solicitors who will be acting for us in this matter are Messrs. W. C. Cripps Harries & Hall, of Calverley Road, Tunbridge Wells, whose London office is at 8, King's Bench Walk. I understand the solicitors acting for you are Messrs. Harrington & Noble, Manfield House, Strand.

On Feb. 1, 1935, the plaintiffs wrote unconditionally accepting the defendants' offer. By letter dated Feb. 11, 1935, the defendants refused to proceed with the loan and the plaintiffs claimed damages for loss suffered including items of special damage as follows :—

	£	s.	d.
Agreed commission paid on arranging of temporary mortgage	161	0	0
Negotiating fee paid on arranging final mortgage ..	61	10	0
Solicitors costs of temporary mortgage	42	7	6
Estimated loss of rents	84	15	0

The defendants denied any breach of agreement. In the alternative, they said the alleged agreement was void and/or unenforceable in law by reason of the terms and uncertainty thereof. They also pleaded the absence of a sufficient note or memorandum to satisfy the Law of Property Act, s. 40, and they further relied upon the Statute of Frauds, s. 4, as the agreement was not to be performed within one year of the making thereof. Also, it was objected that damage from loss of rents of the premises to be purchased was too remote to be recoverable in law.

F. J. Tucker, K.C. and *W. H. Moresby* for the defendants : The matter never got out of the region of negotiation. The two letters

referred to were so vague that they could not be treated as contractual documents. That view is put forward not as a question of intention but as the construction of the relevant documents. The letter of Jan. 31, 1935, was a contract to make a contract. [He referred to *Von Hatzfeldt-Wildenburg* v. *Alexander* (1).]

G. J. Lynskey, K.C. and *S. Seuffert* for plaintiffs: The letters of Jan. 31 and Feb. 11, 1935, incorporating as they do, an application form and a schedule, form a complete contract. There is in these two documents an agreement to make an immediate advance repayable over a period of ten years. If the £14,000 had been advanced under the terms of these two documents, the position of the parties during the ten years would be regulated by the documents. At the end of ten years, if nothing were done, the statutory provisions would apply.

As regards damages, it is clear from the documents that this loan should be raised for the purpose of completing the contract to purchase the leaseholds. We adopt the language of HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 10, p. 121, that upon the breach of a contract to lend money the additional expense incurred in obtaining the loan elsewhere is a natural result of the breach and may be recovered, or such other substantial damage as was within the contemplation of the parties. [He referred to *Prehn* v. *Royal Bank of Liverpool* (2).]

HAWKE, J.: This is an unusual matter and, if I construe the documents properly, it presents an aspect which I do not remember coming across before in connection with this profession. The plaintiffs are suing the defendants for the repudiation of their contract to lend certain money. I do not propose at this moment to do more than to state my judgment in a somewhat general form. I accept the principle that an agreement to make an agreement is not an agreement. There can be no doubt about that. The question here is: Is that position the result of the agreement arrived at between the parties as I understand them? If I come to the conclusion that this is nothing but an agreement to make an agreement, the matter comes to an end and the defendants are entitled to my judgment. I have heard it argued that the true position is that this is nothing else but an agreement to make an agreement and Mr. Moresby cited to me *Von Hatzfeldt-Wildenburg* v. *Alexander* (1) at pp. 288 and 289, where PARKER, J., expresses views which Mr. Moresby submitted would help me. I think that these views are not in any way related to the question I have to try. I think I have to try whether the parties made one agreement for a loan of £14,000 spread over a definite period or whether they made an agreement for that loan for a time agreeing together that when that period was at an end, they would come to another agreement. I take it that the transaction was the latter. They agreed what should be done for ten

years. That being so, I see no legal difficulty about the matter. I think it is a question of such agreement and it does not involve a definite agreement made between the parties but they contemplate that at some future date they will have to make another and independent agreement. I quite agree that if the words of this contract differed it might make a great deal of difference to the result of this case. I asked Mr. Moresby if there was a form of argument which would help me as to this. For instance, if I could say that the term of ten years was to be affected by something which was to happen afterwards, I should no doubt be driven to the conclusion that it was all one contract and that I should have to treat the matter as being one bargain and being a bargain to make a bargain. I do not think that is so. I think that there was an agreement between the parties as to ten years on Feb. 1, 1935, intended to be complete, and repudiated thereafter by the defendants. That being so, I think there is a memorandum of the agreement and I need not worry about the Statute of Frauds or the Law of Property Act, 1925. I accept, of course, the principles applied in the *Bank of Liverpool* case (2), but I am not prepared to form the conclusion that it could have been in the reasonable contemplation of the parties that there should be two sets of commission paid for the introduction of the money, no matter whether it be called commission or a negotiation fee. If you are forced into accepting a temporary loan, you might have to pay a greater rate of commission than if you are asking people to invest their money in a settled investment. I therefore give the plaintiffs £161 as damages. I am not prepared to accept the proposition that it was within the contemplation of the parties that two fees should be paid.

I think they are also entitled to something in respect of the leases. It is quite obvious to me that the plaintiffs did not stipulate for any particular time for the advancing of the money. They stipulated for a reasonable time, and the money would have had to be advanced within a reasonable time. I am not going to accept £84 15*s*. I propose to give myself the privilege of being a jury and I propose to reduce it to £42 7*s*. 6*d*., which the intelligent and enquiring mind might see is half the amount. Judgment will therefore be for the plaintiff for £203 7*s*. 6*d*.

Solicitors : *Harrington, Edwards & Cobban* (for the plaintiffs) ; *Sharpe, Pritchard & Co.*, agents for *W. C. Cripps, Harries & Hall*, Tunbridge Wells (for the defendants).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law*.]

DESOUTTER BROS. LIMITED *v.* J. E. HANGER & CO., LIMITED AND ARTIFICIAL LIMB MAKERS, LIMITED.

[KING'S BENCH DIVISION (MacKinnon, J.), **February 28, 1936.**]

Income tax—Royalty—Sum paid in advance for anticipated use of patent.

By an agreement in writing dated Dec. 22, 1934, the plaintiffs granted to the defendants a licence to make use, exercise and vend (for certain specified purposes and over a certain specified period) artificial legs or leg parts made in accordance with a patented invention of the plaintiffs. In consideration of the licence and of the anticipated user of the invention the defendants agreed to pay to the plaintiffs £3,000, £1,000 down and the remainder by instalments. In discharge of one instalment the defendants paid £387 10*s.*, being £500 less income tax at the current rate. The plaintiffs contended that the sum of £500 was not income of the plaintiffs from which any income tax was lawfully deductable, but was an instalment of a capital sum and accordingly was capital :—

HELD : defendants were not entitled to deduct the income tax because the instalment of £500 was not by way of income, but was a capital sum.

[**EDITORIAL NOTE.** The distinction here drawn is between a sum paid for the past user of a patent or other protected matter and a sum paid in advance in anticipation of user. Since no one can be certain what use is going to be made of the patent, or indeed if any use is to be made of it at all, it seems clear that such a payment in advance must be a capital sum and not income. It follows also that when such a sum is payable in annual instalments, the instalments are not income, being mere part payments of a capital sum.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 17, p. 236, para 476 ; and FOR CASES, see DIGEST, Vol. 28, pp. 18-20, Nos. 92-98, and Supp.]

Case referred to :

(1) *Constantinesco* v. *R.* (1927), 43 T.L.R. 727 ; 11 Tax Cas. 730 ; 28 Digest 19, *97.*

ACTION for £112 10*s.*, balance of payment due under an agreement in writing.

Cyril L. King for the plaintiffs.

L. C. Graham-Dixon for the defendants.

MACKINNON, J. : This case involves a question of considerable importance, because it raises the point whether a certain payment is by way of income or capital The question arises under a deed of Dec. 22, 1934, made between the plaintiffs and defendants, which provides for the consideration of £3,000 to be paid by the defendants to the plaintiffs, on the plaintiffs granting to the defendants a licence and authority to use artificially-made leg parts made in accordance with certain letters patent. The letters patent appear to grant the use of the patents for five years, the licensees having the right to pay the sum of £1,000 down and the balance at intervals. When under this deed payment of £500 fell due, the defendants deducted £112 10*s.* as representing income tax and claimed that they were entitled to do so. The plaintiffs disputed their right to do so and brought the present action. The question is whether

the defendants were right in deducting income tax on the ground that this was a payment in the nature of income.

I am referred to All Schedules Rules, r. 19. The second paragraph of the rule is this :

> Where any royalty, or other sum, is paid in respect of the user of a patent, wholly out of profits or gains brought into charge to tax, the person paying the royalty or sum shall be entitled, on making the payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the royalty or sum was accruing due.

The word " royalty " is not used at all in this agreement and the phrase about " royalty " in the rule is about user of a patent. In this case there is a lump sum paid as a sum entitling the defendants to make all or any use that they may choose of the patent. It is most material that it is a lump sum payment in advance of the anticipated use of the patent rights. I find the greatest guidance from the case of *Constantinesco* v. *R.* (1). This was an award of £3,000 made for the past user of certain inventions. This was held to be a case where payment was by way of income and not by way of capital. Rowlatt, J., says at p. 740 :

> I have not the least doubt that you may pay a lump capital sum in lieu of royalties, or to capitalise what is really a royalty, if you like to put it that way, for the use of a patent. Now has that been done ? Mr. Montgomery put a case to me—an obvious case. Supposing, before the user, it is said : " Now pay £25,000 "—or whatever sum the parties agree to—" and use it as much as you like, for a definite time or for the whole length of the patent." That will clearly be a lump sum. It would not be parting with the patent, because other people might use it, but it would be clearly a capital sum in my judgment.

That very neatly anticipates the present point in this case. In this case the hypothetical case which Rowlatt, J. is citing is realised. It is an agreement by which the plaintiffs say " pay £3,000 and use the patent for five years." This is not the case of an estimated sum after it has been used. This assists me to decide that the defendants were not entitled to deduct this sum, because it was not by way of income, but was a capital sum.

Judgment for the plaintiffs.

Solicitors : *Alfred Cox & Son* (for the plaintiffs) ; *Clifford-Turner & Co.* (for the defendants).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

ROZENDO AYRES RIBEIRO *v.* OLIVIA DA RITTA SIQUEIRA E FACHO

[PRIVY COUNCIL (Lord Alness, Lord Maugham and Sir Sidney Rowlatt), **February 14, 1936.**]

Privy Council—Appeal—Order for an account—No formal decree—Account taken—Report confirmed—Decree drawn up and ante-dated, according to date of judgment.

By a judgment of the Supreme Court of Kenya, given on Aug. 19, 1932, the appellant, with other defendants, was, at the suit of the respondents, ordered to furnish an account of the administration of certain trust property, of which the respondents were the beneficiaries. No formal decree was drawn up following the judgment. Accounts were duly taken, and on June 26, 1933, the Registrar's report was confirmed by the Chief Justice. On the same day a decree, which included the findings against the appellant, was drawn up, entered and signed by the Chief Justice. That decree was ante-dated Aug. 19, 1932, the date of the judgment. On Sept. 16, 1933, the appellant submitted a memorandum of appeal against the judgment and decree. By the Rules of the Court of Appeal for Eastern Africa "the memorandum of appeal shall be presented in civil cases within three months . . . from the date of the decree appealed against" :—

HELD : (i) the memorandum of appeal was not in time.

(ii) the appellant had an opportunity, if not a duty, in the event of desiring to appeal, to take steps to have the judgment of Aug. 19, 1932, drawn up in the form of a decree, and there were no special circumstances such as would entitle the appellant to lodge the memorandum of appeal out of time.

[**EDITORIAL NOTE.** The law of Kenya requires that a judgment shall be drawn up in a formal decree before it may be appealed from. It is clear from this short case that where the law so requires it is the duty of an intending appellant to move the court to draw up and issue the formal decree or order in order that he may be in time with his appeal. If he omits to do so the Court of Appeal in the colony has a judicial discretion to allow or exclude the appeal and, if that discretion is properly exercised, the Privy Council will not interfere to allow an appeal.

FOR APPEALS TO THE PRIVY COUNCIL, see HALSBURY, Hailsham Edn., Vol. 11, p. 230, para. 446 ; and FOR CASES, see DIGEST, Vol. 16, pp. 137-145, Nos. 353-436.]

Case referred to :

(1) *Jivanji* v. *Jivanji* (1929), 12 Kenya L.R. 41.

APPEAL by special leave from a decree of the Court of Appeal for Eastern Africa, dated Jan. 10, 1934, dismissing an application by the appellant for leave to appeal out of time from a judgment and decree of the supreme Court of Kenya, dated Aug. 19, 1932.

D. N. Pritt, K.C., and *Lawrence Tooth* for the appellant.

F. R. Evershed, K.C., and *T. Mathew* for the respondents.

The judgment of their Lordships was delivered by LORD ALNESS.

LORD ALNESS : The proceedings which gave rise to the appeal were instituted on June 7, 1929, in the Supreme Court of Kenya at Nairobi, by the respondents, who are daughters of the late B. C. Siqueira, as plaintiffs,

against (1) the appellant, and (2) the respondents' mother, as defendants. The latter, by a trust deed dated Oct. 27, 1910, had appointed the appellant to act jointly with her as co-trustee of the respondents' share in the estate of their late father. The purpose of the suit was to obtain an order against two defendants—one of whom was the appellant, and the other the respondents' mother—to furnish an account of their administration of the trust property, and for payment of an amount alleged to be due by them. The appellant pleaded that the trust deed had not been acted upon, and that he took no part in the administration of the estate. The other defendant pleaded that she was ignorant of business affairs, and that the proper person to render accounts was her brother, who had been appointed her co-trustee under the trust deed, and who, by virtue of a power of attorney and a partnership deed, had managed the estate of her late husband.

A second suit was instituted by the respondents, on Sept. 13, 1929, against their mother alone. Their brother, who has already been referred to, and the appellant were joined as co-defendants. This suit referred to certain other property, which is not material to this appeal. The first and second suits were ultimately consolidated.

The consolidated suit, out of which this appeal arises, came before the Chief Justice of the Supreme Court of Kenya, Sir Jacob Barth, and, on Aug. 19, 1932, he delivered a written judgment upon it. By that judgment all three defendants were ordered to furnish an account, but a distinction was drawn between the liability of the appellant and that of the other defendants. No formal decree, following upon that judgment, was drawn up. In virtue of the judgment, an account was duly taken before the Registrar of the Supreme Court of Kenya (1) as between the respondents and the first and second defendants, and (2) as between the respondents and the appellant. On June 19, 1933, the Registrar submitted his report upon the accounts to the learned Chief Justice. The Registrar held that, in respect of the trust moneys referred to, the appellant was liable to pay to the present respondents the sum of Shs. 101,615, the equivalent of Rs. 22,000, with interest at 6 per cent.

On June 26, 1933, the learned Chief Justice confirmed the Registrar's report and, on that date, a decree, which included findings against the appellant, was drawn up, entered, and signed by the Chief Justice. This decree was ante-dated, and was described as "given under my hand and the seal of the court on Aug. 19, 1932"—being the date of the judgment aforesaid. On Sept. 16 the appellant submitted to the Registrar of the Court of Appeal a memorandum of appeal against the judgment and decree of Aug. 19, 1932, in which he craved for leave to appeal against it upon certain grounds which were set out in the memorandum. The Registrar refused to accept the memorandum of appeal. On Nov. 23, 1933, the appellant presented an application to the Court

of Appeal for leave to appeal out of time. This application was duly heard by the Court of Appeal, and by decree dated Jan. 10, 1934, the application was dismissed, for reasons which appear in the written judgment of the court. On Feb. 10, 1934, an application by the appellant to the Court of Appeal for leave to appeal to His Majesty in Council from the decree aforesaid was dismissed. On May 14, 1934, however, an application by the appellant for special leave to appeal from the said decree to His Majesty in Council was granted by Order in Council of that date.

Before the Board the appellant contended (1) that his memorandum of appeal was timeously lodged, and, alternatively, (2) that, in the circumstances, he should have been allowed to file it out of time.

(1) As regards the first contention, the rules of the Court of Appeal provide that "the memorandum of appeal shall be presented in civil cases within three months . . . from the date of the decree appealed against." In this case, the date affixed to the decree appealed against was Aug. 19, 1932, and it would seem, therefore, that the memorandum of appeal was not timeously lodged. The appellant, however, contended that the ante-dating of the decree was improper and wrong, and that it should bear the date on which it was in fact pronounced. On that question the Court of Appeal offered no opinion, inasmuch as the application before them was one to appeal out of time. Equally their Lordships, for the same reason, consider themselves absolved from pronouncing an opinion on that matter. The order appealed against is one dismissing an application by the appellant to appeal out of time. Their Lordships may add that they would find difficulty in affirming the contention of the respondents that the original judgment of Aug. 19, 1932, not having been drawn up in the form of a decree within the definition contained in sect. 2 (4) of the Kenya Civil Procedure Ordinance, 1924, could be treated as a decree from which an appeal might competently have been taken.

(2) In holding that the appellant had not made a case for being allowed to appeal out of time, the Court of Appeal exercised a judicial discretion, and manifestly such a decision would require strong reasons in order to justify interference with it on appeal. Their Lordships are unable to hold that such reasons have been forthcoming. There can be no doubt that the appellant had an opportunity, if not a duty, in the event of desiring to appeal, to take steps to have the judgment of Aug. 19, 1932, drawn up in the form of a decree. The Court of Appeal say :

> Once the judgment was delivered, he (the appellant) could and should have taken steps to ensure his appeal being within time, and, having failed to do so, there are no special circumstances which would justify our granting the application.

If further authority for that proposition be required, it will be found in the case of *Jivanji* (1). The head-note in that case bears :

> that it is the duty of a party who wishes to appeal against or apply for a review of

a decree or order to move the court to draw up and issue the formal decree or order.

In that duty the appellant failed. In these circumstances it is not possible for their Lordships to hold that the Court of Appeal exercised its discretion improperly in the matter. That being so, the appeal must fail. The appellant must pay the costs of the appeal.

Solicitors : *Hy. S. L. Polak & Co.* (for the appellant) ; *Charles Russell & Co.* (for the respondents).

[*Reported by* Sam Khambatta, Esq., *Barrister-at-Law.*]

ANTONIO DIAS CALDEIRA *v.* FREDERICK AUGUSTUS GRAY.

[Privy Council (Lord Alness, Lord Maugham, and Sir Sidney Rowlatt), **February 14, 1936.**]

Privy Council—Appeal—Trial before judge alone—Pure question of fact—Functions of appellate court.

Where the trial judge has come to a conclusion upon a pure question of fact, the appellate tribunal cannot, merely because the question is one of fact, and because it has been decided in one way by the trial judge, abdicate their duty to review his decision, and to reverse it, if they deem it to be wrong ; but the functions of the appellate tribunal when dealing with a pure question of fact in which questions of credibility are involved are limited in their character and scope.

[EDITORIAL NOTE. There is, strictly speaking, no appeal from a finding of fact by a jury, although an application may be made for a new trial where the finding has been against the weight of evidence. In a non-jury case, however, the appeal is in the nature of a re-hearing, and the Court of Appeal must re-hear the case, reconsidering the materials which were before the judge. The presumption is that the trial judge is right on the facts, and unless the judge is satisfactorily made out to have been wrong, his decision will not be disturbed. Where questions as to credibility of witnesses arise, the appellate court is at a great disadvantage, in that it neither sees nor hears them, and unless it can be shown that the judge has failed to use or has palpably misused his advantage, the appellate court will not take the responsibility of reversing his conclusions. The Judicial Committee applied these principles in the present case. The point which arises here must not be confused with that which arises upon concurrent findings of fact by a trial judge and by an appellate court. In such circumstances, upon a further appeal to a higher appellate tribunal, the latter will not, as a general rule, disturb those findings (*Mendip Range Steamship* v. *Radcliffe*, [1921] 1 A.C. 556 ; 36 Digest 269, *135*). In the present case, however, the appeal was direct from the Supreme Court of Trinidad and Tobago, the court of trial, and that question did not arise.

For the Principles on which the Court of Appeal Acts on Appeals Generally, see HALSBURY, 1st Edn., Vol. 23, Practice, p. 202, para. 371 ; and for the Cases, see DIGEST, Practice, p. 769-771, Nos. 3348-3362, and YEARLY SUPREME COURT PRACTICE, 1936, p. 1235.

Cases referred to :

(1) *Powell and Wife* v. *Streatham Manor Nursing Home*, [1935] A.C. 243 ; Digest Supp.

(2) *Kirkpatrick* v. *Dunlop*, [1916] S.C. 631.

(3) *Taylor* v. *Burger* (1897), 35 S.L.R. 400.

APPEAL from a decision of MANNING, J., sitting as a judge of first instance in the Supreme Court of Trinidad and Tobago.

D. N. Pritt, K.C., and *Ronald Smith* for the appellant.

H. J. Wallington, K.C., and *Reginald J. White* for the respondent.

The judgment of their Lordships was delivered by LORD ALNESS.

LORD ALNESS : In this case the respondent, who is a sales manager, sued the appellant, who is a doctor, for damages. The claim was based on negligence. The respondent was treated for malaria by the appellant, and the former affirms that, in giving him a quinine injection in the right buttock, the appellant travelled beyond the safe area for injection, and that the quinine injured the respondent's sciatic nerve, with the result that he is permanently lamed.

Now, the first observation which falls to be made is that their Lordships are manifestly and indeed admittedly confronted with a pure question of fact for determination. There is no question of law at issue between the parties. Moreover, it is agreed between them that the *onus* of proof is upon the respondent, and that, if he is to succeed, he must demonstrate, beyond reasonable doubt, that the appellant was negligent, and that his negligence caused the injury of which the respondent complains. Had the case been tried by a judge and jury, their Lordships are of opinion—and Mr. Pritt did not seriously contest the proposition—that an appeal against a verdict for the respondent would be well nigh hopeless. There is ample evidence to support such a verdict, and it could not be seriously contended that a verdict for the respondent would on the evidence led have been unreasonable. The case, however, was not tried by a judge and jury, but by a judge sitting as a jury. The distinction is, of course, important.

The appellant is exercising a right of appeal which is his by right, and their Lordships recognise that they cannot, merely because the question is one of fact, and because it has been decided in one way by the learned trial judge, abdicate their duty to review his decision, and to reverse it, if they deem it to be wrong. None the less, the functions of a Court of Appeal, when dealing with a question of fact, and a question of fact, moreover, in which, as here, questions of credibility are involved, are limited in their character and scope. This is familiar law. It has received many illustrations—and, in particular, in the House of Lords—the most recent of these being the case of *Powell and Wife* v. *Streatham Manor Nursing Home* (1). In that case it was held that :

> Where the judge at the trial has come to a conclusion upon the question which of

the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be; and the appellate tribunal will generally defer to the conclusion which the trial judge has formed.

Lord Wright, in the course of his speech at p. 265, said:

Two principles are beyond controversy. First, it is clear that, in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal "must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong."

That view is in strict accord with previous authoritative expositions of the law in the same sense by Lord Loreburn and Lord Halsbury in two cases in the House of Lords, which do not appear to have been cited in *Powell's* case (1), viz., *Kirkpatrick* v. *Dunlop* (2), and *Taylor* v. *Burger* (3). It remains to be seen whether, and, if so, to what extent, these judgments affect the decision of this case. In order exactly to equiparate the decisions in these cases with the present case, a conflict of testimony between the appellant and the respondent would be required. Here there is none; for, while the appellant affirms that the injection was administered by him within the safe area in the buttock, the respondent not unnaturally is unable to say where precisely the injection was given. There is, however, a sharp conflict of testimony between the expert witnesses.

In limine of the case, it falls to be said that the trial judge did not believe the testimony of the appellant on vital points—an incident which will be developed later—and that, *quoad ultra*, the decision of the case rested on the evidence of medical men, two of whom were examined as witnesses for the respondent, and three for the appellant, and who expressed diametrically opposite views regarding the cause of the respondent's disability. The learned trial judge accepted the view of the medical men adduced as witnesses for the respondent, and rejected the view of the medical men adduced as witnesses for the appellant. Their Lordships see no reason to doubt that, in assessing the relative value of the testimony of expert witnesses, as compared with witnesses of fact, their demeanour, their type, their personality, and the impression made by them upon the trial judge—e.g., whether, as Mr. Wallington said, they confined themselves to giving evidence, or acted as advocates—may powerfully and properly influence the mind of the judge who sees and hears them in deciding between them. These advantages, which were available to the trial judge, are manifestly denied to their Lordships sitting as a Court of Appeal.

Having considered the general principles which are applicable to a case of this kind—and this would seem to be a proper avenue of approach to the problem before the Board—their Lordships proceed to consider the facts which give rise to the appeal.

[Their Lordships then reviewed the facts of the case.]

In the result, their Lordships are of opinion that the respondent's theory of his disability, as supported by the medical evidence which he adduced, has not been displaced by the evidence adduced by the appellant. The former is clear, simple, and straightforward. The latter is speculative, theoretical, and unconvincing. In any event, their Lordships are clearly of opinion that, the respective theories having been carefully and dispassionately weighed by the learned trial judge, and a clear conclusion in fact having been reached by him, it would not be proper or safe, or in accordance with sound practice, that their Lordships should reverse the conclusion in fact at which he arrived. The appeal therefore, in the opinion of the Board, falls to be dismissed. The appellant must pay the costs of the appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Druces & Attlee* (for the appellant); *Daphnes* (for the respondent).

[*Reported by* SAM KHAMBATTA, ESQ., *Barrister-at-Law.*]

DOTT *v.* BROWN.

[COURT OF APPEAL (Lord Roche, Scott, L.J., and Eve, J.), **March 5, 6, 1936.**]

Income Tax—Debt—Payment by instalments—Instalments to continue during life of creditor—All Schedules Rules, r. 19.

By an agreement of compromise in respect of a sum of money owed, the respondent, *inter alia*, covenanted to pay to the appellant two sums of £1,000 each on the dates therein mentioned and £250 on each succeeding March 31 so long as the appellant should live, such covenant to bind the respondent's estate after his death :—

HELD : the annual payments were instalments of capital and not of income and the respondent was not entitled to make any deductions in respect of income tax.

Observations on what cases are suitable for the Short Cause List.

[**EDITORIAL NOTE.** It is said that the liquidation of an antecedent debt by annual or other periodic payments is a capital payment, and not an income payment. The position here is unusual since, though there is an undoubted antecedent debt, it is not to be liquidated by a definite number of instalments amounting in all to the amount of such antecedent debt, but by a number of annual payments continuing during the life of the debtor. Where an annuity is purchased, the capital sum spent in the purchase is regarded as passing out of existence and is replaced by the annuity, which is treated as income. In the present case, the indefinite number of payments during the life of the creditor are not treated in this way as having replaced a capital liability, but as being instalments of the capital.

FOR THE LAW ON SUCH PAYMENTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 180-182, para. 378; and FOR THE CASES, see DIGEST, Vol. 28, pp. 65-67, Nos. 335-350.]

Cases referred to :

(1) *Foley (Lady)* v. *Fletcher* (1858), 3 H. & N. 769 ; 28 Digest 65, *336.*

(2) *Secretary of State in Council of India* v. *Scoble*, [1903] 1 K.B. 494 ; [1903] A.C. 299 ; 28 Digest 65, *337.*

(3) *Chadwick* v. *Pearl Life Insurance Co.*, [1905] 2 K.B. 507 ; 28 Digest 66, *347.*

(4) *Jones* v. *Inland Revenue Commissioners* (1920), 7 Tax Cas. 310 ; 28 Digest 108, *667.*

(5) *Inland Revenue Commissioners* v. *Ramsay* (1935), 14 Ann. Tax Cas. 533.

Appeal from a decision of Lawrence, J., given on July 29, 1935, in which he held that the annual payments hereinafter referred to were payments of income and not of capital.

In reply to a letter from the respondent's accounts concerning the respondent's liability to income tax in respect of the above-mentioned payments, the Special Commissioners of Income Tax wrote as follows :

> With reference to your letter of the 18th instant addressed to the clerk to the Special Commissioners regarding the question of deduction of income tax from sums payable by your client to Mr. Thomas Dott under an order of court I am directed by the Board of Inland Revenue to say that the matter is primarily one for settlement between the payer and the payee, and is not one which immediately affects the Revenue or on which the Board can offer an opinion which is in any way binding on the parties concerned.
>
> On the information before the Board, however, if the deduction of tax from the sum in question is appropriate, the authority for deduction will be rule 19 of the General Rules, Income Tax Act, 1919, and no question arises of the application of rule 21, under which deduction and accounting to the Revenue might be required.

The facts and arguments are fully set out in the judgment of Scott, L.J.

Hon. Quintin M. Hogg for the appellant.

Leonard J. Stein for the respondent.

Scott, L.J. : In this case I will summarise the facts historically in order to see what the position was at the time of the transaction upon which the question in the case turns. Before dealing with the facts I would like to say that we are greatly indebted to Mr. Quintin Hogg for the very clear and terse argument which he addressed to us yesterday. The case begins in past history with a debt from the respondent to the appellant which amounted to between £9,000 and £10,000 and was the subject of proceedings in bankruptcy after a judgment obtained. On the proceedings in bankruptcy—a petition founded upon the judgment—the registrar refused to make a receiving order and there was an appeal to the Court of Appeal, and on the matter coming on in the Court of Appeal on Feb. 3, 1933, a consent order was made by the court in the following terms :

> By consent no order on appeal except that the £20 paid into court by the petitioner be paid out to him, and that the order of the registrar be varied by directing that each party should pay his own costs.

Then there is the following agreement of compromise between the parties :

1. The petitioner to accept various considerations enumerated in sub-paras. (*a*) to (*d*) :

(*a*) all the debtor's 5,000 preference shares in a certain company with dividend rights ;

(*b*) the assignment of the full benefit of a certain deed of covenant ;

(*c*) the covenant of the debtor to pay £1,000 on Mar. 31, 1933, £1,000 on Mar. 31, 1934, and £250 on each succeeding Mar. 31 so long as the petitioner should live, such covenant to bind the debtor's estate after his death ;

(*d*) the debtor to undertake to procure the transfer of the above-mentioned shares to Dott to be registered and to indemnify the petitioner against the costs of any legal proceedings which the petitioner might have to take in the debtor's lifetime to procure the transfer of any of the above-mentioned shares by the petitioner.

Those are the essential items in the consideration. The second clause is a mere promise to make no claim in respect of the bankruptcy proceedings. That agreement contains the transaction which is in question on this appeal.

The terms of the agreement were carried out from Feb. 3, 1933, down to the spring of 1935, the two payments of £1,000 on Mar. 31, 1933, and a year later being duly made. On Apr. 15, 1935, the defendant (respondent here) instead of paying £250 as provided by the agreement deducted income tax in making the payment amounting to £56 5*s*. 0*d*., leaving a balance, for which he sent a cheque, of £193 15*s*. 0*d*. The appeal raises the question as to whether that deduction was a lawful deduction within the provisions of the Income Tax Acts and equivalent to payment as between the debtor and the creditor or not. [His Lordship read the letter set out above.]

Payment of the balance of £56 5*s*. 0*d*. not being made, a writ was issued on June 25, 1935, by the present appellant, specially endorsed for that amount. A summons for judgment under R.S.C. Ord. XIV was taken out, with an affidavit in support and an affidavit in answer, with the natural result in a case of this kind that unconditional leave was given to defend, or rather, no conditions were imposed except that the action should be put in the Short Cause List for trial by a judge and the affidavits being treated as pleadings. I feel personally a little doubt as to whether it is right to take out a summons under R.S.C. Ord. XIV where there is really no possibility of obtaining a judgment. I am not sure that it is a satisfactory use of R.S.C. Ord. XIV that it should be employed purely for tactical purposes, but at any rate the natural result followed. LAWRENCE, J., heard the action, and decided in favour of the defendant—the respondent here.

Before us Mr. Quintin Hogg submitted that the appeal ought to be allowed on two grounds: (1) That even assuming against the appellant

that the payments of £250 each under the agreement of compromise were payments in the nature of income within the meaning of the Income Tax Acts there was no evidence before the learned judge that the £250 in question had been paid wholly out of profits or gains brought into charge to tax within the All Schedules Rules, r. 19; (2) That the respondent based his claim to deduct solely on that rule in his affidavit in opposition to judgment under Ord. XIV—and indeed had obtained a ruling on behalf of the Board of Inland Revenue to the effect that if it was an appropriate case for the deduction of tax at all it must be under rule 19, and that rule 21 had no application. He further submitted that on the case there was no evidence that rule 21 was a rule which could have any application to the facts of the case, but he said: "My main contention is that the assumption I made in my first contention is wrong—that under the agreement of compromise all the payments provided for were capital payments and not income payments. All the instalments were in part repayment of the principal debt owing from the respondent to the appellant which was the subject matter of the agreement of compromise."

The court does not think it necessary to discuss in detail the first ground of appeal, as we think the appellant is entitled to succeed on his second ground. We need not therefore embark upon an elaborate analysis of the All Schedules Rules, rr. 19 and 21, nor need we consider the various distinctions there are between those two rules, which apart from our second decision, might have been necessary, but we desire to make it clear that we must not be taken as accepting the submission of Mr. Hogg that the Crown could not, if it was in a position otherwise to do so, have subsequently said that in spite of the letter from the Special Commissioners rule 21 was applicable. On the other hand, *prima facie*, the court does think that on the facts of this case there was no evidence that there was any right to deduct put forward or relied upon, except under rule 19, and that the respondent was bound by his election to proceed under that rule. Having elected to do so he put his case on that basis, and like any claimant has to show that he has brought his claim so framed within the facts of the case, and we do not think that there was any evidence at all upon which he could base a claim under rule 19. The All Schedules Rules, r. 19 contains these essential words:

> Where any . . . annual payment . . . is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such . . . annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the . . . annual payment. . . .

and then, that deduction is equivalent to payment by the debtor to the creditor for all purposes as between those two.

The essential condition of rule 19 as distinct from rule 21 is that the payment to be made is payable *wholly* out of profits or gains brought

into charge to tax. There is no evidence here at all that the payment in question was a payment payable wholly out of such profits and gains, namely, those brought into charge, and for those reasons—though we do not actually decide the case on that ground—the court takes the view that probably that argument on the facts of this case was right. We do decide the case on the second ground, namely, that under this transaction of compromise in the Court of Appeal on appeal from the Bankruptcy Registrar, the essence of the transaction was that all the payments mentioned in sub-clause (*c*) of clause 1 of the agreement of compromise were capital payments—instalments of the capital consideration payable under that agreement in discharge of a pre-existing debt of between the sum of £9,000 and £10,000, and that that being so the whole question is lifted out of the area of detailed consideration of the rules of the Income Tax Acts because the payment was wholly outside the Income Tax Acts. That being the real question in the case, it is necessary to say a few words on the judgment of the learned judge and of the criteria to be adopted. The learned judge in his judgment in favour of the defendant—the present respondent—after referring to the various cases, said:

> In my opinion the contention of the defendant is right—

that is to say, that they were annual payments and not capital payments.

> The answer to the question whether the amount to be received by the plaintiff is properly attributable to capital or to income, is not conclusive of the case.

I do not understand that first sentence, but it seems to say, "Even if the £250 payment due on Mar. 31, 1935, was an instalment of the capital sum payable in liquidation of the principal debt, it is not conclusive of the case." If it means that—and I cannot see any other meaning to be attributed to the sentence—I respectfully disagree with the learned judge's view, as I think it was cardinal to the decisions of the case. The various cases on one side or the other of the line distinguishing between a series of payments which are in fact instalments of a capital sum and a series of payments which are in the nature of an annuity were cited to us by Mr. Hogg in so far as was necessary. Before referring to them—which I want to do very shortly—I desire to make this observation. This particular topic as to whether a case falls on one side or the other of the line is one in which it is very important if possible to see what the general principle underlying the distinction is; and it is dangerous to treat the salient facts of a particular case as constituting an exhaustive or even a determining guide to the decision of other cases. These cases are necessarily in nature, as a rule, complicated—some of them very complicated—and it is natural the court should select from the facts of a particular case those which in the view of the court appear

to be strikingly on one side or the other side of the line and the particular factor which strikes the court most tends to become a dominating factor in that particular case, and there is always a danger in citing that case afterwards of thinking that that particular factor is a conclusive criterion when the court never intended it to be such. With that general observation in mind, I want to look at the cases in order to see what the question of principle is. A consideration of the cases shows that you have to examine the details of the particular transaction out of which the payment arises and make up your mind as to the substance of it—the reality of it—not being bound or guided unduly by particular terms, and bearing in mind always that words are not conclusive and may be misleading, and being very careful not to treat a particular signpost in one case as conclusive of another case on different facts.

The first case cited was that of *Foley* (*Lady*) v. *Fletcher* (1). That was a case where there was a sale of certain mines for a lump sum payment. She being seised in fee of one moiety of the mines, Lady Emily Foley sold her share for £45,000 payable as to £3,000 immediately and the residue by half-yearly instalments of £768 during a period of 30 years. Looking at it to-day it seems difficult to understand how there could be any doubt as to the nature of those annual payments during those 30 years. We should say at once that they were perfectly and clearly obvious instalments of the principal purchase money covenanted to be paid, and that is, of course, as we know, the decision arrived at by the court, but the decision was given on a demurrer raised to the fourth plea as to £236, a parcel of the instalments, that on making payment of the said instalments defendants deducted and retained out of the said instalments respectively divers sums of money amounting in the whole to £236, being the amount of the rate of duty which, at the times when the said instalments were respectively become payable, was payable under the statute—a similar provision under the statute of 1834, as we know, to that under r. 19—and the question was as to whether on the transaction, which was all contained in a written document, the payments were instalments of principal money or payments of instalments of an annuity in the strict sense of the word. Pollock, C.B., there said (p. 779):

> If the annual payment is the repayment of principal, the return of a debt, and is not profit, it is not at all within the purview of the Act, the very title . . . imposing a tax on profits. If there is the purchase of an annuity, that annuity is made chargeable in express terms. But this is not a contract to pay an annuity, but to pay a principal sum of money, and the court can only carry into effect the language of the Act.

Watson, B., said on the last line on p. 784:

> But an annuity means where an income is purchased with a sum of money, and the capital has gone and has ceased to exist.

Now I do not think that that case lends any further assistance to the court in getting at the principle. In that particular case it was plain that the nature of the instalments was not altered merely because instead of being two or three or four instalments they were sixty half-yearly instalments for a period of thirty years.

The next case cited was that of *Secretary of State in Council of India* v. *Scoble* (2). Mr. Hogg did not cite the judgment in the Court of Appeal, but in view of LORD MACNAGHTEN'S expression of opinion at p. 303, where he said "I think the case is well put in the judgment of VAUGHAN WILLIAMS, L.J.," I propose to refer to that judgment (at p. 501):

> I assent to a great deal that the Attorney-General has said about annuities, but it seems to me that the outcome of the argument left the case for the Crown in this position. It could not be said that every annual sum payable on a contract was necessarily an annuity within the Income Tax Acts. It had to be admitted that, in any case in which it appeared on the face of the contract that there was a debt existing of such a nature that it could be said that the contract was not to purchase an annuity, but a contract under which a debt was made payable by instalments, in such a case the Income Tax Acts would not apply to the whole sum payable by such annual instalments.

A little further on he said:

> The whole question is whether income tax is payable on that part of the annual payment which can be discovered from the terms of the contract to be a payment of an instalment towards the complete payment of the existing debt.

The principle laid down in that judgment is that you must look at the transaction and see what its effect really was, and the judgments of LORD HALSBURY and LORD DAVEY in the House of Lords in that case repeat in effect that the criterion is the same, and in that particular case, that the annual payments were made in discharge of a long term purchase though they were called an annuity in the transaction. The House of Lords pointed out that although they were called an annuity in fact they were really a mode of making the payment of that which had become a debt to be paid by the Government. There again there was the antecedent debt payable by a number of instalments for reasons of financial convenience, as is so often the case.

Now the other cases that were cited were, till the last one, two cases on the other side of the line. The first was *Chadwick* v. *Pearl Life Insurance Co.* (3). There the plaintiff, the owner of a leasehold interest expiring in 1912 in certain property, which was sublet at a gross rental of £1,925, subject to a ground rent of £300 to the superior landlord, contracted with the defendants for the sale to them of his interest, the transaction being carried out by two deeds of even date. By the first the property was conveyed subject to the payment of the ground rent and of a sum of £1,000. By the second deed the defendants covenanted

with the plaintiff to pay to him by quarterly payments a sum of £1,625 per annum, which was the exact equivalent of the annual income—the net annual income—receivable by the plaintiff before the transaction, namely, £1,925, less the ground rent of £300. On the facts of that case Walton, J., held that the parties did intend on the completion of the transfer of the leasehold interest to keep the plaintiff in the same financial position of being in receipt of an income as he had been in before. While it is quite unnecessary, as it seems to me, to consider whether in the light of subsequent expressions of opinion in the Court of Appeal, the decision of Walton, J., in that particular case was right or wrong, he did attempt to apply the right criterion—that is to ascertain what the reality of the transaction was—and came to the conclusion for reasons on the facts of that case that the annual payments were intended by the parties to be income and not instalments of capital. He says :

> The distinction is a fine one, and seems to depend on whether the agreement between the parties involves an obligation to pay a fixed gross sum.

Now, that phrase is an illustration of the danger of taking a particular signpost as having more meaning than that of mere signpost. The words " fixed gross sum " are a phrase that may mislead if stated as a final test. Take a very simple case—a sale for a lump sum, which is to be paid ultimately by reference to certain subsequent considerations affecting the amount—a sort of arrangement that the ultimate sum payable may be higher or lower as the value of the property sold may turn out to be more or less—a perfectly natural and not uncommon transaction in the sale of certain types of property, particularly where goodwill is included in the sale. No fixed sum is there defined because the true essence of the transaction is that the consideration shall vary according to future calculations depending on certain facts. To say that, because in that transaction the sum might so vary it was not a capital payment, would be an erroneous conclusion.

The next case cited is the case of *Jones* v. *Inland Revenue Commissioners* (4). Rowlatt, J., there expressed the principle quite clearly, and I think it is quite unnecessary to discuss the question as to whether or not his actual decision in that case was one which to-day would be treated by this court as a proper decision. I assume that it was—I merely point out that he followed the same true criterion of looking at the substantial character of the bargain.

The last case that I would refer to is *Inland Revenue Commissioners* v. *Ramsay* (5). There was an agreement for the sale of a dentist's practice in consideration of a purchase price of £15,000, payable by payments of £5,000 down and 25 per cent. of the profits of the practice for ten years, with certain provisions as to certain other contingencies, but the net effect of which, broadly, was that the practice was sold including the good-

will for a price which the parties did not attempt to fix finally at the moment of the transaction, and, as I see it, it was a bargain between them under which, if the goodwill proved very valuable, the vendor would get a bit more, and if it proved less valuable than they thought at that time he would get a bit less, and therefore it was essentially a case in which the consideration was not an absolutely fixed price, and yet the Court of Appeal, reversing FINLAY, J., said that it is quite clear that these annual payments were payments of a capital sum in discharge of the debt for payment of the purchase price, and were not in any sense income. In the course of that case, the Master of the Rolls reviewed the cases, and I am not going to repeat his review except to say that, as I understand it, it lays down the broad principle that we must look at the substance of the transaction in each case and see whether it is income or capital that is being paid. Both he and ROMER, L.J., pointed out that you get two types of transactions which are both of them quite common. You may sell a capital asset for instalments of the purchase price or you may transmute the principal debt into a true income annuity. Both are ordinary transactions in human affairs. Which a particular bargain consists of can only be ascertained by careful analysis of that bargain, and in my view that is the gist of the decisions of the Court of Appeal in that case. It was a unanimous decision, and I do not think it necessary to discuss it in detail. It might be quite true, as Mr. Stein said, that in the judgments the court did pay particular attention to the fact that the primary price payable—£15,000—which was to rise or fall according to the ultimate yield of the business, was mentioned by them as a very important factor which runs right through the whole transaction; but it was not because it was a fixed figure but because it was quite obvious from the use in the contract of that figure that it was intended to be a price and nothing but a price, and it would be a mistake to suppose that the court were relying on it because it was a fixed figure in the case—it was quite clear that it was not a fixed figure.

Now to apply those principles to the particular bargain in the case before us. You start here with the antecedent debt of £9,000 to £10,000, which by the agreement of compromise was to be liquidated in a certain manner. You have therefore the presumption that the consideration for this liquidation would be a capital payment of the same kind as the debt itself—not an income payment—unless the transaction makes it quite clear that an annuity was being bought, so to speak, by the release of the debt. Now, in the contract you get first of all the provisions that the shares are to be assigned. Well, there is nothing of income here. Then there is the benefit of a certain deed—we do not know anything about that. Then you come to the covenant in question, and it is to pay £1,000 on Mar. 31, 1933, and another a year later, and then £250. Stopping there, there is no reason to treat any one of these payments—

the £1,000 payments or the £250 payments—as anything more than instalments of purchase price, and in fact the two £1,000 payments were so treated and paid in full. Why, then, should one presume that the parties in the transactions intended the £250 to be in any sense different in nature to the two £1,000 payments—it was all in the same clause—no distinction. The only scintilla of doubt which I can see is raised by the language of the clause—that the payments of £250 are to be terminated on the petitioner's death. Well, now, why the parties should not have made that bargain without in the least intending it to substitute an income annuity for a capital instalment, I cannot see, but surely the natural meaning of it is that the seller—the creditor—says: "If you carry out that provision of payment of instalments as long as I live, I shall be satisfied. After that we may cry quits and my estate will not ask any more." I think that is quite clear, but if there is any ambiguity in it at all, in my view it is for the party contending that the nature of the payments of the £250 is different from the nature of the payments of £1,000, to show that this is so, and unless it is made clear, then I think that the decision must be that the £250 remained capital just as much as the £1,000 payments. For these reasons the court must disagree with the result of the judgment of the learned judge below, and the appeal must be allowed with costs here and below.

Lord Roche: I agree so entirely with the conclusion reached by the Lord Justice and with the reasoning on which it is founded that there are very few observations which I desire to add. As, however, we are differing from the view of a judge whose opinion we hold in so high respect, I desire just to add one or two observations. The case, as the Lord Justice has stated, has been very well argued before us on both sides. I have no doubt that the learned judge enjoyed the same advantage, although it appears that the argument proceeded towards the end of July, when the facilities for very full arguments were not perhaps so great as we possess in this court.

It is quite obvious that when one reads the judgment of the learned judge that the scale in the defendant's favour was tipped—if I may use that expression—by the reliance that the learned judge thought ought to be placed upon certain observations, and not decisions, of such eminent judges as Walton, J., and Rowlatt, J., and naturally, in the cases which my Lord has referred to sufficiently, there are observations which might be read, and I think were read, by the learned judge who decided this case as of wider application than they were probably intended to have—I mean observations as to the effect of the contingent nature of certain payments and as to the importance of the fact that in some events the repayments made might possibly exceed the amount of the debt or the purchase price.

The learned judge had not the advantage which we have had of the

decision of this court in *Ramsay's* case (5), which was given only during the last sittings. LORD WRIGHT, M.R., and ROMER and GREENE, L.JJ., decided this case. In *Ramsay's* case (5), which was a strong case, the facts of which have been stated by the Lord Justice, the Court of Appeal had before them circumstances of a striking nature. In that case the payments to be made depended to some extent upon the profits of a business, and they might—according to the profits of that business—exceed or they might fall short of the principal debt. Yet the court regarded them without question as capital payments and not as income, and they made observations of an important order as to the proper way of reading such a contract, and explained the observations of WALTON, J., and ROWLATT, J., to which the Lord Justice has made reference. The substance of those observations was, the Lord Justice has said, that the considerations in question are important factors, and, of course, they are in any case, but it is a mistake and there is no real guidance to be had in supposing that these considerations ought to be regarded as conclusive ones. With the advantage to which I have referred of this judgment of the Court of Appeal I have no doubt as to the conclusion at which we ought to arrive, namely, that these payments were payments of a capital nature made and to be made by the defendant as a discharge of the debt and received by the plaintiff in part satisfaction of that debt, but I only desire to add this—that as I construe the agreement the payments to be made would naturally fall short of the full repayment of the debt, even although the plaintiff might live a good life—a long time to receive the final instalments which were to be made during his lifetime. My reason for that opinion is that the stipulation that the condition named —the plaintiff was to accept in full satisfaction of his debt—is language applicable to compromise and to the acceptance of a sum short of the full sum rather than to any contemplated likelihood of a sum larger than the judgment debt being received. For that reason the *prima facie* conclusion to which I am led from the structure of the agreement itself is that it is a compromise of a capital debt; for this, as well as for the reasons which have been explained by the Lord Justice, I have arrived at this clear conclusion as to the nature of the payments. I agree with him that that being so it is unnecessary to consider and still less to decide the other point upon the rule.

I only desire to add this—that it may very well be that, as the learned judge thought, it might in some cases be quite enough to present a claim for liberty to deduct and therefore retain tax, to say that I, the person so claiming to deduct, am entitled to do it under rule 19 or rule 21, and I make that claim alternatively; but there is a great deal to be said for the view here that even if we had been against the plaintiff on the first point, the defendant would have been out of court in this particular case on the facts—for this reason—that under rule 19 he gave no evidence

to show that the tax in question was ever payable or paid out of any income of his own which paid tax—he did not show that he had any such income—and on the other hand, under rule 21, which was not the rule under which he in the course of the action claimed to deduct it, he was in difficulties, because so far as the case had gone the revenue authorities had disclaimed any present intention of claiming that any tax at all should be paid in respect of the instalment payments now in question. In these circumstances that would be a difficulty in the way of the defendant showing that he was intending either to account for or pay to the Crown tax which he claimed to deduct—the necessary condition qualifying the putting into effect of rule 21. I quite agree with what the Lord Justice has said as to the letter of the Commissioners not binding the Crown so that the Crown might never be able to claim tax in respect of these payments, but, of course, mind you, the letter did amount to this—that it dispensed the defendant from any obligation to deduct tax and left it to the authorities if they changed their minds to proceed by the alternative remedy of asking for the tax from the plaintiff on the payment which *ex hypothesi* on that showing were to be income. Now for these reasons I agree that the appeal may be allowed and that the plaintiff should have judgment with costs here and below.

There is one last observation I desire to make—I agree with the Lord Justice in regard to many cases in which the machinery provided by R.S.C. Ord. XIV is put in motion, but I regard this as probably one where it was natural that the plaintiff should seek to take advantage of the facilities provided by the Short Cause List. Historically when the courts were very much congested in the time of the late Lord Chief Justice, Lord Reading, it was determined that full use should be made of the Short Cause List in spite of the fact that risks had to be taken owing to the want of knowledge of masters and that cases which would take a longer time would find their way into this list. This may be one of those, but it is natural in my view that it should be sent for trial in the Short Cause List, and I have no complaint to make of that matter.

The order proposed is that judgment may be entered for the plaintiff, with costs here and below.

Eve, J.: I agree as to the nature of the payments and I so utterly concur in what my Lord and the Lord Justice have said that I do not think I could add anything useful.

Leave to appeal to the House of Lords refused.

Solicitors: *Ballantyne, Clifford & Co.* (for the appellant); *Bartlett & Gluckstein* (for the respondent).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

IN THE ESTATE OF NUNN, DECEASED.

PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.), **March 2, 1936.**]

Will—Mutilation—Strip cut out and ends joined—Presumption of revocation of part cut out—Wills Act, 1837 (*c.* 27), *s.* 20.

The testatrix in 1921 had a will prepared by her solicitors in the usual way. In 1935, some two months before her death, she asked for the will and sent it to the solicitors. She was then about 98 years old. It was noticed that the will had been cut and stitched, but as she was then ill, nothing was said about it. In fact two or three lines had been cut out of the will and the remainder stitched together again. There was no evidence when this had been done but there was evidence that the lines taken out were not of a dispositive character :—

HELD : the part cut out had been revoked and the remainder should be admitted to probate.

[**EDITORIAL NOTE.** Where there has been destruction of a part of a will, the cases are fairly clear that, so long as the part destroyed is not one of the parts essential to the validity of the will as a testamentary instrument, and it can be assumed that the remainder was intended to stand without it, the remainder can be admitted to probate as the last will of the testator. In the present case the stitching together of the remaining parts clearly indicates an intention that when so joined together they should form the will.

AS TO DESTRUCTION OF PART OF A WILL, see HALSBURY, 1st Edn., Vol. 28, Wills, p. 571, para. 1137 ; and FOR THE CASES, see DIGEST Vol. 44, pp. 349, 350, Nos. 1798-1808.]

Case referred to :

(1) *In the Goods of Woodward* (1871), L.R. 2 P. & D. 206 ; 44 Digest 349, *1801*.

APPLICATION made on behalf of the executrix named in the will of the deceased, dated Mar. 1, 1921, for a grant to her of probate of the will, which was in a mutilated state, a portion having been cut out from the centre and the remaining parts sewn together with cotton. The deceased died on Oct. 3, 1935, aged 98, leaving estate of the approximate value of £3,500. No completed draft had been made by the solicitors to the testatrix, but their clerk who in 1921 prepared the will on the instructions of the testatrix, had declared his recollection that the words which had been cut out were mere surplusage and not of a dispositive character. Under the will the testatrix left her estate to two daughters, one of whom was the executrix. The same daughters would have shared equally most of the estate under an earlier will. There were other children of the testatrix, but all the members of the family who would have shared in the estate in the event of an intestacy consented to the will being admitted to probate in its present condition.

The will had been in the possession of the testatrix from the time of its execution until about two months before her death. A question arose whether her affairs were in order, and she asked one of the two daughters to take the will out of a locked box, handing her the key.

At the request of the testatrix Mrs. Howard (the executrix) took the will, which was in its present condition, to the solicitors. The solicitors observed the cut and the stitches, but did not deem it desirable that, in the infirm condition of the testatrix, she should be asked to make a new will. The will was then returned to the possession of the testatrix and was in the same condition on her death. It was not known when the piece of the will was cut out, but the testatrix could have done so with scissors at any time when she was alone. She was an expert needlewoman and kept up her sewing until about 1931.

William Latey, for the applicants: By the Wills Act, 1837, s. 20: "No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, . . . or by the burning, tearing, or otherwise destroying the same by the testator . . . with the intention of revoking the same." This section applies to the portion of the will which was cut out, and that portion has been revoked by the testatrix *animo revocandi*. He asked that the will in its present condition should be admitted to probate. It is certainly possible that the missing words may have been of a precatory nature, especially as the testatrix had at some time or other written words of that nature on the back of the will, which, however, could not be regarded in any way as part of the will itself. Whether the missing words were dispositive or not, on a long line of decisions upon sect. 20. including *In the Goods of Woodward* (1), the presumption is that the words were cut out by the testatrix with the intention of revoking them, and the court is entitled to hold that only the missing part of the will has been revoked and that the remainder should be admitted to probate.

Sir Boyd Merriman, P., admitted the will in its present form to probate.

Solicitors: *Morley, Shirreff & Co.* for *Gross & Curjel*, Woodbridge (for the applicant).

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law*.]

SHIFFMAN *v.* THE GRAND PRIORY IN THE BRITISH REALM OF THE VENERABLE ORDER OF THE HOSPITAL OF ST. JOHN OF JERUSALEM.

[KING'S BENCH DIVISION (Atkinson, J.), **March 4, 9, 1936.**]

Negligence—Erection of flag pole—Public gathering—Allurement of children.

The defendants, at the request of the police, erected a casualty tent in a public place where it was anticipated large crowds would gather. Nearby they erected a flag pole which was supported only by four guy ropes. A man was left in charge of the tent, and it was his duty to prevent interference with the flag pole. Children who came to play round the pole and to swing on the rope, were repeatedly warned by the attendant to keep away. While the attendant was assisting a casualty inside the tent, the pole fell and injured the plaintiff. No warning had been given to the plaintiff and to other people near the pole :—

HELD : the accident was due to the defendants' negligence in the erection of the pole and the insufficient means taken to protect it from interference by children, having regard to the fact that it was an allurement to them.

Semble : the flag pole came within the doctrine of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330.

[**EDITORIAL NOTE.** There is probably an inherent difficulty in ascertaining the exact degree of care required in cases where an object, not particularly dangerous in itself, is an allurement to children. Upon the facts in this case it seems that a flag pole erected in a public place must be continually watched if numbers of children are likely to be near it. It is not sufficient that they are driven away from time to time, especially where the probability is that different groups of children will be attracted to it.

FOR THE LAW ON SUCH ALLUREMENT, see HALSBURY, 1st Edn., Vol. 21, Negligence p. 373, para. 640 ; and FOR CASES, see DIGEST, Vol. 36, pp. 69, 70, Nos. 442-453.]

Cases referred to :—

(1) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 ; 36 Digest 187, *311.*

(2) *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.*, [1914] 3 K.B. 772 ; 36 Digest 189, *315.*

(3) *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co.*, [1921] 2 A.C. 465 ; 36 Digest 192, *332.*

(4) *Box* v. *Jubb* (1879), 4 Ex. D. 76 ; 36 Digest 198, *379.*

ACTION for damages for injuries sustained by the plaintiff as the result of the defendants' negligence.

The facts and arguments are fully set out in the judgment.

Frederick Hallis for the plaintiff.

John Foster for the defendants.

ATKINSON, J. : In this case Shiffman is claiming damages against The Grand Priory in the British Realm of the Venerable Order of the Hospital of St. John of Jerusalem. The defendant order is one which carries on in the interests of the public a most useful and invaluable work, and I am told, and what indeed I knew, that everybody who does

this work which we see being done amongst us so much does it all for nothing; they are all voluntary workers. But, of course, the fact that their work is of so much value to the public and the fact that the individual officers do their work for nothing, I am afraid, do not affect the measure of their duty to members of the public, and they have to be judged in the same way as if their work were done for their own benefit.

The facts in this case are as follows:—Shortly before May 6, 1935, the defendants were asked by the police to erect a casualty tent in Hyde Park. Everybody knows what May 6 was: it was the day upon which the twenty-fifth anniversary of the late King was going to be celebrated and large crowds of people were expected to congregate in London; it was going to be a public holiday and everybody knew that Hyde Park would be full of people, particularly on the Monday evening, on the evening of the 6th, when there was going to be a very large bonfire there. The police indicated to the defendants the spot at which they wanted this tent erected. It was on a line between the Marble Arch and the Serpentine: one was not told whether it was nearer one point or the other, but it was somewhere on that line. On the Sunday the tent was erected; and some 30 yards away from the tent a flag pole was erected. The flag pole was 30 feet high and was erected in this way. According to Mr. Roust, the pole was just placed upon the ground, and three pegs 1 foot 9 inches long were then driven into the ground up against the pole to prevent the base of the pole sliding from one side to the other. Those pegs had no effect whatever from the point of view of holding the pole up. Then the pole was maintained in position by four guy ropes. The ropes are attached to the upper section of the pole and come down and pass round pegs which are driven into the ground, looped round these, and at the end of each rope there is a strip of wood called a runner with t. o holes in it. I think we are all familiar with what Mr. Roust described—the rope itself passes through both these holes and this runner can be slid up and down; you tighten it by sliding the runner upwards and you loosen it by sliding it downwards. The sole means of supporting this pole in position were these four ropes. All the four ropes are necessary for maintaining the pole in position; if one of the ropes becomes unlooped from round the peg the pole will almost certainly fall in the opposite direction; there is nothing to stop it. It was stated in evidence that these runners are very easily moved. What happened was this. It being erected on the Sunday, on Monday during the day there was one man in charge, Sergeant Haxell. The main purpose for which he was there was to watch the tent to see that stores and other things within the tent were not stolen. It was also his duty, said Mr. Roust, to watch the pole in case children should interfere; in other words, it was anticipated by the defendants' responsible officials that on a day like this there would be many people there, that children

perhaps would be there in great numbers and would be very apt to interfere with the ropes of the tent or pole. At any rate he was there to watch. In fact children were there in great numbers; and Sergeant Haxell said that from about 2 o'clock onwards, children came repeatedly running round the pole in bodies, seizing the ropes and swinging themselves round and doing it very fast, that he repeatedly warned them, but they came again and again, not necessarily, he said, the same children, but there were so many children about that fresh lots were playing the same game. He said there were children 8 years old, 10 years old and older. Then at about 3.30 two men brought a woman along to the tent; she had apparently fainted, and whether in the fall or how I do not know, she was bleeding from the wrist, and he heard somebody say something about an artery being cut. At any rate he went into the tent to attend to this case; he was there some five or ten minutes when, hearing a shout, he looked out of the tent and saw children running away from the pole. I do not know whether he actually saw the pole falling, but at any rate either he saw it then or immediately after the pole had reached the ground. There is no doubt, I think, on that evidence that it was the interference of the children that caused the pole to fall. Unfortunately for the plaintiff he and his wife were spending the holiday in the park, and they had sat on the ground here for the purpose of resting. It will be remembered that the Sunday and the Monday were both beautiful days, continuous sunshine all the time. He was lying on the ground with his head in his wife's lap. When this pole fell, it fell right on his head and inflicted quite serious injuries upon him. There were other people lying about too within some 30 yards of the tent: there were two of the defendants' own officers doing just the same thing, resting, lying on the ground; they were not on duty but resting.

Those are the facts, and I do not think there is any dispute about any of them. The question is whether in those circumstances there is a legal liability upon the defendants. In my opinion the pole was erected in a way which was obviously unsafe. The day was to be a public holiday; the celebrations were sure to attract a great number of people to the park, of which a large number would be beyond doubt children. A pole supported by ropes is certainly an allurement to children. Mr. Roust said that that indeed was anticipated, that it was one of the reasons for having a watchman; and that it was in fact an allurement is proved by what happened on the Monday afternoon because body after body of different children were all attracted to it—the same thing. They were very likely to play around it and with it, and the possibility of their playing with and meddling with the ropes was one which must or ought to have been foreseen—indeed I think it was foreseen. The pole as erected was one which would be very dangerous to people sitting or lying about if it fell, and it was erected in such a way that really a very

small act of interference might bring it down. A child had only to seize one of these runners and slide it down towards the peg and nothing would be easier than for the rope to come from around the peg and for the pole to fall. I think that the circumstances of the afternoon, the position, the time, the events that were happening, all imposed a duty upon the defendants to take due care that the pole should be properly and safely erected having regard to the conditions which were reasonably certain to prevail; or, perhaps alternatively, if it were really necessary to erect it in this manner, in a manner in which any interference might cause it to fall, then their duty was to take steps effectively to secure that it should be watched or protected from interference. I cannot myself see that there is a word which should be said in support of the idea that it was necessary to erect it in this way. Mr. Roust said that they usually did when it was being erected for a temporary purpose, but he said that it would be safer to put it into the ground; and it was quite obvious that if it had been sunk two feet into the ground or a socket had been driven into the ground and the flag post inserted into the socket it would have been immeasurably safer. There was no necessity to erect it in this way at all, and I have not the least doubt in the circumstances of the case, it was erected in a way which was unsafe, and I think it was obviously unsafe to people of reasonable intelligence. Then on the top of that I think that wholly insufficient steps were taken to protect it. There was one man on duty for all purposes; he was there to watch the tent; he was there to watch the pole; and he was the only skilled person available if a casualty should be brought along to the tent. I know it was said that they were not expecting casualties until the night when the real crowd would be there; but the flag pole remained with the flag flying; there was the tent and the whole thing was an invitation to anybody who was ill to come there, and nobody can suppose that the possibility of people needing attention was one which ought not to have been present in their minds. It seems to me that the defendants as to this part of the case, are in this dilemma: either it was the duty of this man to attend any case which came along or it was not: if it was his duty it meant that there would be periods when there would be no protection for this flag pole at all, and it would be just those periods when there was nobody on guard which would be chosen by children to come and play all the more freely because the guardian was away; if it was not his duty to attend a casualty then I suppose he neglected what was his duty in order to render a service which was not. There are other things he might have done. When he realised, as he ought to have done earlier in the day, that these children were constantly playing around he must have realised, or ought to have realised, what might happen at any moment. It was not as if he was standing with a stick against the pole keeping people off. Again and again they were in

fact swinging round these ropes. All he could do when he saw them doing damage was to shout at them or send them off. The damage might be done at any moment of time and before he had any opportunity of stopping them. Why did he not warn people who were lying round about: "it would be safer for you to keep clear of this pole?" After all you had only to keep about a dozen yards from it, and you would be quite safe. He knew how the pole was erected and one single act in connection with one of the runners might bring that pole down. The innocent people sitting and lying round about would not know it, but he knew it. I cannot but think that a man of reasonable intelligence taking reasonable care when he saw what was happening would have warned people to get further away. Then there were in fact two officers within easy call. When this casualty appeared he had only to call them to come and help. He said that it was not really his duty to attend the case. If it was not his duty, it was no more his duty than theirs. When he knew how dangerous it might be to leave this place unprotected I think he ought to have called these other two men to come and help deal with the case or, if he wished to deal with the case, while he was away to see that the children did no harm.

Therefore I am driven to the conclusion that this accident was caused by the negligence of the defendants by the negligent way in which the pole was erected and by the insufficient means taken to protect it under the conditions which must have been anticipated as likely to prevail on May 6.

I do not know that it is necessary to decide it, but there is another ground upon which I think that liability might well rest. I cannot myself see why this is not within the rule in *Rylands* v. *Fletcher* (1). The defendants erected something exceptional, something which would be easily caused to fall, and something which, if it fell, was likely to do mischief to others, for if it fell it was certain to fall on land of which they were not in occupation and upon which the public had a right to be. The rule is not limited to the use of a defendant's own land; the rule is applicable as between licensees. That is the case of the *Charing Cross Electricity Supply Co* v. *Hydraulic Power Co.* (2). The same proposition was laid down by LORD SUMNER in *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co.* (3). Of course, under that rule, a defendant is not liable for the acts of a stranger, but I think that exception must be subject to limitations. In *Box* v. *Jubb* (4), it was said that it must be the act of a stranger over whom and at a spot over which the defendants had no control. I cannot help thinking that it would be very difficult to hold that this case was an exception to the rule where the act of interference was one which indeed was anticipated, and which certainly ought to have been anticipated, and an act which in the circumstances it was their duty to prevent. I do not decide the case

on this basis, on the ground of *Rylands* v. *Fletcher* (1), although I cannot see myself why on the pleading it would not be open if it were necessary to the plaintiffs to rest the case on that rule. But I decide the case on the ground that negligence has been proved.

[His Lordship then dealt with the question of damages and awarded the plaintiff £210.]

Solicitors: *Tarlo & Co.* (for the plaintiff); *Lee & Pembertons* (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

MATTHEWS *v.* HANSCOMBE AND ANOTHER.

[KING'S BENCH DIVISION (Goddard, J.), **March 12, 1936.**]

Contract—Implication of terms—Contract to construct roads on building estate.

By the terms of a registered transfer of certain property, a right was given to the transferors and their successors in title of land adjoining the property transferred at any time within a period of 15 years to make a roadway therein referred to, and the transferees covenanted that as soon as the transferors should exercise their option to make the roadway and give notice thereof to the transferees, the transferees would construct a roadway (a continuation of the roadway above-mentioned) to the reasonable satisfaction of the transferors' surveyor. And by the transfer the transferees were granted a licence at any time within 15 years to enter upon a part of the property retained by the transferors for the purpose of carrying out the construction of the said roadway. The transferees also undertook to keep the roadway in repair until it should be taken over by the local authority. The transferees, acting under the licence above-mentioned, entered into a contract with the local authority for the making up of the road which would necessitate dedication of the road to the public:—

HELD: (i) the satisfaction of the transferors' surveyor would not be required if the transferees were to build a roadway under their licence and not under notice from the transferors.

(ii) inasmuch as it was contemplated that the local authority would take over the maintenance of the roadway at some time, the contract with the local authority necessitating dedication to the public was not a breach of the agreement or a matter of which the transferors could complain.

[EDITORIAL NOTE. The many contracts and covenants now being made in connection with building estates make the construction of this contract of interest. The second point may seem obvious when read, but it does emphasise the necessity for stating clearly the purposes to which a road is intended to be put. If the matter is left at large it would seem that it is easy to imply that the road is to be a public one where houses and other property are intended to be erected upon the land adjoining it.

AS TO IMPLIED TERMS IN CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 7, p. 322, para. 451; and FOR THE CASES, see DIGEST, Vol. 12, pp. 610-613, Nos. 5044-5066.]

Case referred to :

(1) *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488 ; 12 Digest 610, *5042.*

By a deed of conveyance dated Feb. 15, 1935, certain personal representatives conveyed to the plaintiff land comprising the remainder of what had been known as the Tucker estate, such remainder consisting of a field adjoining the northern boundary of land belonging to the defendants and a strip of land connecting the defendants' land with Bouverie Road. By a second deed of conveyance dated Feb. 15, 1935, the personal representatives assigned to the plaintiff all benefit of each and every covenant made at any time before with the personal representatives in relation to any part of the estate. The land belonging to the defendants referred to above formed part of the Tucker estate and had been conveyed to them by the personal representatives by deed of conveyance dated Jan. 13, 1927. By such deed of conveyance the personal representatives granted full liberty and licence to the defendants at any time before Jan. 13, 1942, to enter upon the strip of land (connecting the defendants' land with Bouverie Road and now the property of the plaintiff) for the purpose of constructing a roadway to a point of defendants' land specified in the deed of conveyance and after such roadway had been completed the defendants were to have a right in common with the personal representatives and their successors in title for passing and repassing along and over the roadway on the said strip. The strip was excluded from the land conveyed to the defendants and the roadway was to be made to the reasonable satisfaction of the surveyor acting for the personal representatives. By an indenture dated May 7, 1935, made between the first-named defendant of one part, and the Urban District Council of Banstead of the second part and T. R. Edridge and C. J. Martin as sureties of the third part such defendant covenanted to construct a carriage way passing over (amongst other land) the said strip of land and by clause 6 of the agreement covenanted that when the houses proposed to be erected and not earlier than the expiration of 12 months from the completion of the whole of the work for the full length of the road or for such section as might be agreed then subject to the issue of a certificate by the council's surveyor, the council should at their discretion, declare the road or part of the road to be a highway repairable by the inhabitants at large.

The plaintiff claimed (*a*) a declaration that the defendants have no right or title to convey to the council any rights in respect of the said strip of land or any roadway on such strip and that any roadway constructed on such strip of land by the defendants will be or is the property of and in the ownership of the plaintiff subject only to the rights of the defendants as defined by the deed of conveyance dated Jan. 13, 1927.

(*b*) a declaration that any such roadway shall be made to the reasonable satisfaction of the plaintiff's surveyor.

The arguments are fully set out in the judgment.

H. A. H. Christie, K.C. and *B. L. A. O'Malley* for the plaintiff.

F. K. Archer, K. C. and *E. J. Rimmer* for the defendants.

Goddard, J.: By a registered transfer dated Jan. 13, 1927, the personal representatives of one Joseph Tucker, deceased, sold to the defendants, Mr. and Mrs. Hanscombe, certain land at Woodmansterne, in Surrey, and it was provided in that registered transfer that :

> The transferees to the intent and so that this covenant shall be binding on the land hereby transferred into whosesoever hands the land may come hereby covenant with the transferors and their successors in title that the transferors and their successors in title shall have the right at any time within a period of 15 years from the date hereof,

without reading the whole of the covenant, to make a roadway 40ft. in width over a piece of land called strip " A," and which is afterwards referred to in the plans as a reserve strip that comes from the northerly boundary down to somewhere about the middle of the boundary. So under clause 1 of the first clause of this schedule the transferors and their successors in title may at any time within 15 years if they like, make this road to this point. Then by clause 2 it is provided that :

> The transferees covenant with the transferors that so soon as the transferors exercise their option as mentioned in clause 1 hereof and give to the transferees notice that they are about to proceed with the construction of the road therein mentioned the transferees shall forthwith commence and with due diligence proceed with the construction of a roadway 40 feet in width from the point marked " A " to the point marked " B " on the plan annexed hereto and shall complete the same fit for ordinary traffic within three calendar months from the date of the said notice and to the reasonable satisfaction of the transferors' surveyor. The transferors hereby grant full liberty and licence to the transferees at any time hereafter within a period of fifteen years to enter upon the site of that portion of such intended roadway as is marked " Strip ' B ' " on the said plan for the purpose of carrying out the construction of the said roadway from the point marked " A " to the point marked " B " on the said plan and after such work has been completed the transferees shall have a right in common with the transferors and their successors in title and all other persons who have or may hereafter have the like right of way over that strip.

It is also provided that :

> if at the expiration of fifteen years from the date hereof the construction of the said roadway shall not have been commenced the transferors or their successors in title shall be at liberty to deal with the portion thereof marked " Strip ' B ' " on the said plan free from any of the aforesaid rights, liberties and licences in favour of the transferees and in so dealing therewith shall be at liberty to erect one dwelling house thereon.

In other words, if the transferees do not exercise their right the

transferors can build on the land and it is finally provided in clause 3, the whole of which I need not read :

> Until the said roadways shall be taken over by the local authorities, the transferees undertake to keep the same in repair and fit for ordinary use.

The way this section arises is this. This land as I say is situated at Woodmansterne, near Banstead, and the plaintiff, Mr. Matthews, the owner of one building estate, apparently desires to maintain an oasis of tarmac in the dreary deserts of by-pass roads, and so forth, which I think we all know run all over the neighbourhood of Banstead Downs, the Epsom roads, the Brighton roads, and so forth. They are all concrete roads, and Mr. Matthews has formed the opinion that tarmac is more rural looking than concrete, a matter which happily I am not called upon to express any opinion about, and he desires that the road which has now been constructed by the defendants should be made with a tarmac covering. The defendants desire to make it with a concrete covering, and they have in fact entered into an agreement with the Urban District Council of Banstead to make it up and then say the Urban District Council, they will maintain it as a local authority.

The real question that I have to determine is whether or not, if the defendants, the transferees, exercise the liberty and licence given to them by the transferors under the deed are obliged to make up the road to the reasonable satisfaction of the transferors' surveyor, or whether the reasonable satisfaction of the transferors' surveyor really comes into force, if the defendants, the transferees, have to make up the road because they are called upon to do it by the transferors.

It seems to me that a second alternative that I have put must be the right one. I need not go really into the question of why the reasonable satisfaction of the transferors' surveyor is stipulated for in one case and not in the other. The plain fact is that that is what the document does say, and it is laid down in *Hamlyn and Company* v. *Wood and Company* (1), which is the best and clearest authority on the subject, LORD ESHER, M.R., at p. 491 :

> ". . . the court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist.

Now it seems to me that there is no necessity for such implication. Clause 2 of this schedule seems to fall into two parts : one which provides what is to be done if the transferors exercise an option and call upon the transferees to do something, and in that case the reasonable satisfaction of the transferors' surveyor is provided for. Then the second part of the clause goes on and provides what is to be done if the transferees exercise the licence which is given by the second part of the clause,

and in that part of clause 2 Mr. Christie has suggested that the satisfaction of the transferors' surveyor was provided for by the use of the words "the said roadway." The said roadway, in my judgment, is only used to designate the roadway which is meant, that is to say the roadway over this particular piece of land, and if you give a person the right to make that roadway and say nothing about complete licence to make that roadway, I do not think it is at all necessary, or indeed possible, to read into that permission words which would severely limit the lease and licence, and which are not to be found in the agreement or covenant.

Consequently I am of opinion that the construction which the defendants seek to put upon this document is right and that the plaintiff is not entitled to a declaration that the roadway is to be made to the reasonable satisfaction of plaintiff's surveyor, it being agreed that it is now being made in consequence of the licence which was granted, and not in consequence of the exercise of the option by the transferors' successors in title, or in consequence of any notice given by them.

Another declaration has been asked for as follows: "a declaration that the defendants have no right or title to convey to the said council any rights in respect of the said strip of land or any roadway on such strip and that any roadway constructed on such strip of land by the defendants will be or is the property of and in the ownership of the plaintiff subject only to the rights of the defendants as defined by the deed of conveyance dated Jan. 13, 1927." It might be enough to say really that no question had arisen before the writ in this action between the parties with regard to that matter. But I express this opinion about what has really happened as I already indicated in the earlier part of this judgment. The defendants entered into an agreement with the Banstead Council under which the Banstead Council will do the work, then the road becomes repairable by the inhabitants at large, which, of course, implies dedication. I cannot conceive that this lease and licence to construct a road meant merely a road which was not to be dedicated to the public. It would be absurd. I do not think that the agreement that has been made here in any way violates any right of the plaintiff. The defendants have the right to make the road in the way they like. The agreement contemplates that at some time the local authority will take over, or may take over, the duty of repairing, and it provides for the duty of repairing remaining on the defendants until the local authority assumes that obligation. Obviously it is to the advantage of the defendants that the obligation of repairing the road should be taken over by the local authority at the earliest possible moment, and as I have said, it is contemplated that they will take it over at some time. This agreement is merely a means whereby the defendants will, having made the road, being under the obligation of maintaining it and transferring it to the local authority, as the agreement contemplates

ultimately, do it as early as possible. I should not, therefore, see fit to make any declaration claimed because in my opinion not only is it a question that no dispute has arisen, or, rather, no dispute had arisen when the writ was issued,but the agreement which has been made does not in any way violate any right of the plaintiff. In consequence the action fails and must be dismissed with costs.

Solicitors: *Gustavus Thompson & Sons* (for the plaintiff); *Kenneth Brown, Baker, Baker*, agents for *Drummonds*, Croydon (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

Re PAVYER, GEO. BROWN, SON AND VARDY *v.* THE TRUSTEE.

[Chancery Division (Farwell, J.), **March 16, 1936.**]

Bankruptcy—Proof—Long delay—Notice of final dividend—Evidence of posting—Extension of time—Discretion—Costs—Bankruptcy Act, 1914 (*c.* 59), *s.* 67.

On Jan. 30, 1933, the trustee in bankruptcy wrote to the creditors asking for a proof of their debt. On Feb. 24, the trustee wrote again saying that he understood that the creditors had a charge upon certain land of the bankrupt and asked for particulars. The creditors replied with some details of the charge, but put in no proof. In Nov., 1935, the creditors wrote again, and in Feb., 1936, a proof was put in. The creditors denied that they had received the statutory notice under the Bankruptcy Act, 1914, s. 67, which the trustee proved he had posted on Dec. 10, 1933. The creditors alleged as the reason for their delay that they believed a negotiation was in progress for the sale of the land :—

Held : (i) proof of posting was sufficient compliance with sect. 67, and the creditors were not entitled to claim.

(ii) in the exceptional circumstances of the case the creditors should be given seven days in which to establish the claim upon paying the costs of the motion.

[**EDITORIAL NOTE.** The Bankruptcy Act, 1914, s. 67, is designed to allow a final distribution of the property of the bankrupt within a reasonable time by giving dilatory creditors a definite time within which to prove their debts. The creditors in the present case denied having received the notice, and the decision is that proof of receipt of the notice is not required by the section, and that all that is required is the giving of the notice in the prescribed manner, *i.e.*, by posting it to the creditors.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 2, p. 317, para. 423 ; and for the Section *in extenso*, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 1, p. 665.]

Motion by the applicants, a firm of solicitors, for a direction that the trustee in bankruptcy should not proceed to distribution by way of final dividend without the applicants having first an opportunity of establishing their claim, or, alternatively, an order under the court's discretion to extend the time mentioned in Bankruptcy Act, 1914, s. 67.

V. R. Aronson, for the applicants.

Tindale Davis, for the trustee.

Farwell, J. : As far back as Jan. 30, 1933, the trustee in bankruptcy wrote to the applicants pointing out that they did not appear to have received proof of their debt, and enclosing a form of proof with a request for them to complete and return it. No notice was taken of that letter, and on Feb. 24, 1933, the trustee again wrote saying that he understood that there was a certain charge on land belonging to the debtor, and requesting details of the charge by return of post. A reply was sent the following day from the solicitors saying that their clients were two of the partners in the firm, and that there was a charge on

certain land near Harpenden. The mortgagees were in possession. No proof was even then put in, and no details given of the value of the security. In fact, nothing was done at all until Nov., 1935, when the solicitors wrote to the trustee, referring to his letter of Feb. 24, saying that they supposed a dividend would shortly be made, and stating that they hoped to let him have their proof within the course of the next few days. They still gave no notice to the trustee of the extent or nature of their security, and no proof was forthcoming until Feb. 10, 1936, which was over three years from the trustee's original notice to them. The reason which had been given for the delay was that they thought there was probably a contract for the sale of the land in negotiation. On Feb. 12, 1936, the solicitors at long last sent the proof, and even then it was not properly in order, and required amendment. In the meanwhile the trustee had quite properly given notice of his intention to make a final dividend in accordance with sect. 67 of the Act. On Feb. 12, the trustee wrote that he was surprised at the contents of their letter of Feb. 10, and pointed out that he had given them the statutory notice on Dec. 10, 1933, and that as the estate was then in the process of distribution, no funds were available to meet their claim. The solicitors' reply to this was that they never received the notice, and that they held the trustee responsible for the funds. The trustee replied that the dividend had been duly gazetted, and produced a copy of the notice which had been sent. [His Lordship read the letter which enclosed the form of proof, which was to bear a 1*s.* 6*d.* stamp and be in the hands of the trustee by Dec. 27.] Mr. Dowley, one of the partners in the firm, has said in evidence that he never received the notice, and this is corroborated by his clerk, Mr. Bird, who opened all letters in connection with the Pavyer matter. I do not suggest that either of these gentlemen said anything which he did not believe to be true, and I assume that the notice has never in fact reached their hands.

The best that the trustee has been able to do is to put in an affidavit by clerks in his office, one of whom had entered the letter in the post-book and the other stamped and posted it. The latter admitted that he could not definitely state that he had seen or noticed the address on that particular envelope, but he had posted all the letters and there were some twenty creditors.

In the result I must take it that the notice was sent but not received, and that being so, I am quite satisfied that posting was all that was necessary by the trustee to show that he had given the proper notice, as the Act said that notice could be given by post. In my judgment it is clear that unless the form of the notice was wrong, sect. 67 applies, and the applicants are not entitled to claim. [His Lordship read sect. 67.] My view of its construction is that it is directed to finality. The form of the notice prescribed is No. 173, and this letter did not follow the

form. In my judgment, however, the letter was sufficient notice within the meaning of the section and was in order so long as it gave all the necessary information, and the motion to prevent the trustee distributing must fail.

With regard to the alternative prayer for the extension of the time for establishing the claim within sect. 67 the court has absolute discretion to extend time in any matters within the Act, but I have grave doubts as to whether I should grant indulgence in this case. The applicants were solicitors, and they have chosen to do nothing but wait to see what their security might produce if they realised it in time, instead of putting in proof, although they must also have known that they could have amended their proof even if they had put it in, and subsequently realised their security. This explanation seems unsatisfactory. It is a large sum, over £2,000, the largest claim, partly money advanced to the debtor and partly costs, no bill of which has ever been delivered, despite requests. If proof is now admitted, taxation may become necessary, and there will be a delay in the payment of the dividend and consequent hardship on the other creditors. The applicants have, in other words, been sitting on the fence. They should have taken notice of the letters of 1933 and have met the trustee's requirements in the proper manner.

But here the trustee naturally cannot prove conclusively at this late stage that the letter containing notice was actually posted. In the exceptional circumstances I propose to extend the time and give them seven days in which to establish their claim. As this is an indulgence under the court's discretion, the applicants must bear the costs of the motion.

Solicitors: *Geo. Brown, Son & Vardy* (for the applicants); *Woolfe & Woolfe* (for the trustee).

[*Reported by* Charles E. Eden, Esq., *Barrister-at-Law.*]

ALDERMAN *v.* GREAT WESTERN RAILWAY COMPANY.

[COURT OF APPEAL (Slesser, Greene and Scott, L.JJ.) **March 24, 25, 1936.**]

Master and servant—Workmen's compensation—Course of employment—Interruption of employment—Railwayman in lodgings away from home—Accident between lodgings and railway station.

A railway ticket-collector lived at Oxford, his "home station." His duty was to "book on" at noon, travel to London, then travel to Swansea, where he was to stay the night in lodgings of his own choice, giving the address to the station officials so that they could summon him in an emergency; next morning he travelled to London and thence back to Oxford. When walking from his lodgings at Swansea to join his train to London he slipped and injured himself:—

HELD: the accident did not arise in the course of his employment.

L.N.E.R. Co. v. *Brentnall* (2) distinguished.

[**EDITORIAL NOTE.** The question for decision here is whether or not there has been an interruption of the employment by the employee leaving the employer's premises. This must turn upon whether the purposes for which the employer's premises were left were the purposes of the employer, or those of the employed. In the present case it is held that in going to his lodgings, the employee was breaking his employment, since from the time he left the employer's premises he was free to travel as he liked and free to spend his time as he liked and had no duty to perform in respect of his employment.

FOR THE LAW ON THE POINT, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, p. 172, para 362 and Supp., and DIGEST, Vol. 34, pp. 283, 284, Nos. 2379-2388.]

Cases referred to:

(1) *St. Helens Colliery* v. *Hewitson*, [1924] A.C. 59; 34 Digest 280, *2364*.

(2) *L.N.E.R. Co.* v. *Brentnall*, [1933] A.C. 489; Digest Supp.

(3) *Philbin* v. *Hayes* (1918), 11 B.W.C.C. 85; 34 Digest 284, *2380*.

(4) *Stewart (John) & Son* (1912), *Ltd.* v. *Longhurst*, [1917] A.C. 249; 34 Digest 279, *2357*.

(5) *Davidson (Chas. R.) & Co.* v. *McRobb*, [1918] A.C. 304; 34 Digest 276, *2339*.

(6) *Sparey* v. *Bath U.D.C.* (1931), 24 B.W.C.C. 414; Digest Supp.

(7) *McCullum* v. *Northumbrian SS. Co.* (1932), 147 L.T. 361; Digest Supp.

THE facts appear fully in the judgments.

The application of the employee was dismissed by the learned county court judge, on the ground that the accident did not arise out of the employment. The employee appealed.

W. Shakespeare, for the appellant

E. W. Cave, K.C., and *D. C. Bartley*, for the respondent company.

Shakespeare: The facts are not disputed, and the only question is whether or not the accident arose out of the employment. A similar accident occurring at Oxford would have been outside the employment, but at Swansea there was no interruption of the employment except by "signing off," which was merely a method of ascertaining how

much the man had earned. He was required to be in Swansea by work which he was employed to do.

Counsel referred to *St. Helens Colliery* v. *Hewitson* (1), *L.N.E.R. Co.* v. *Brentnall* (2), *Stewart* v. *Longhurst* (4), *Davidson* v. *McRobb* (5), *Sparey* v. *Bath U.D.C.* (6), *McCullum* v. *Northumbrian SS. Co.* (7), *Cave, K.C.*, and *Shakespeare* in reply.

Slesser, L.J.: In this case Mr. James Alderman met with an accident on Jan. 17, 1935, by slipping and breaking his ankle on the highway in Swansea. He says that this accident arose out of and in the course of his employment, and no question has been raised in this case but that the accident may have arisen out of the employment; but it is said by the respondents, the Great Western Railway Company, that the learned county court judge was right in coming to the conclusion that the applicant had failed to show that this accident arose in the course of his employment.

As the learned county court judge says in his judgment, the facts in the case are scarcely in dispute, although the inferences as to the nature of the man's employment which are drawn from those facts may, of course, be a matter of debate. The facts which are material are these. The applicant is a ticket-collector, and he lives normally at Oxford; his duties require him to go from Oxford to Paddington, and, having arrived at Paddington, to proceed on another train from Paddington to Swansea. The times at which he performs these various duties are not material, except that it is material to observe that his day's work finishes at Swansea at half-past six in the evening. He then has to stay in or about Swansea for the night, and the next day he books on at half-past eight at Swansea to return to Paddington, travelling at 8.55, and then goes back to Oxford, arriving there in the evening. On the dates in question he had, on Jan. 16, duly proceeded from Oxford *via* Paddington to Swansea, and had, as he usually did, gone to the lodgings where he stayed in Swansea. On the 17th he had not, apparently, very much time; he started off and slipped in the highway when going from his lodgings to the station where he was about to take up his duties and travel back to Paddington as a ticket-collector.

The question is, as I have said, whether at the time when he slipped and broke his ankle he was in the course of his employment. Evidence was given in the case both by the applicant himself and by another ticket-collector, a Mr. Hill, as to the nature of their employment so far as it is material in this case. It appears that these ticket-collectors are not only ticket-collectors, but are qualified guards, and that it is contemplated in the contract of employment that they may be required to do emergency work during the period of their rest when they have booked off (as the saying is) from their actual work as ticket-collectors.

I think the most satisfactory way of dealing with this case is to go

straight to the findings of fact of the learned county court judge which appear in his judgment. On p. 18 he says this :

> The obligation upon him—

that is the applicant—

> was to present himself at the company's premises at the scheduled hour, and if he did so his duty to the company was fulfilled. He was, at the material time and place, using the highway subject to the same conditions and subject to the same risks as a member of the public.

That is, perhaps, a matter of opinion. Then follow these facts :

> His right under his contract of service was after arrival at Swansea to choose any lodgings in reasonable proximity to his work, to exercise an unfettered right in spending his time between signing off and signing on, and to get to the scene of his work by any route or any method of locomotion he might choose to select. His obligations under the contract of service were to leave his address with his employers, not to go too far away, and to sign on at the company's premises (where his duties lay) at the scheduled hour.

Were it not for the fact that in so far as it was an obligation under his contract of service, so found by the learned county court judge, to leave his address with his employers and not to go too far away, I think this case would have been unarguable on behalf of the applicant. That is to say, that if he had a free and unfettered choice at the end of the day to spend the night where he liked and how he liked, and that merely the next morning he had to return to his work, he would be in precisely the same position as any other man who, living at home, has to perform a journey, long or short, in order to get to the place of his employment. Mr. Shakespeare admits, as he must admit on the authorities, that in such a case where there is no obligation to use a particular route, or where there is no duty to use a particular means of transit, a man's work normally begins (subject to certain exceptions, which would not apply in the case which I have suggested) at the place of his work, and the employer is not responsible for accidents which occur before that work starts.

But it is said here, that, in so far as it is an implied term of this man's contract of service that he must be to this extent limited in his choice of nocturnal residence, that he must be in a place not too far away and in reasonable proximity to his work, therefore he is bound, as a matter of duty, or at any rate as a term of his contract, to be in a certain place in order that, if required, he may be found, and that, to quote LORD WRENBURY, in the case of. *St. Helens Colliery* v. *Hewitson* (1), he is "in performance of a duty under his contract of service found in the place where the accident occurs." Such a condition of affairs may exist which was found to exist on the findings of fact of the learned county court judge in the case of *London & North Eastern Railway Company* v. *Brentnall* (2). In that case it was found as a fact by the learned

county court judge, as Lord Buckmaster points out at p. 228, that the workman

as part of his contract of service, was bound to go to this hostel—that is the clear conclusion of the learned county court judge—and he was bound to go to the hostel for a particular purpose—the purpose of obtaining rest and, indeed, it was essential for the proper conduct of his work that he should have rest during the day, for he had to take the train back again at 7.40 at night from Sheffield to Woodford Halse. From the time he left Woodford Halse in the morning, certainly until the time when he returned at night, and, for all I know, for a longer period—but the actual contract of service is not before us—he was in the employment of the railway company, and, as part of the terms of his contract of service, on the spot where the accident occurred.

Then Lord Buckmaster says this—and it is a little significant—on p. 229:

I find it very difficult indeed to distinguish between the case where a man is compelled to take a particular means of going to his work, and a case where a man is compelled to go to a particular place where he has to rest between the different spells of his work, and I cannot help thinking that, if authority were required, *Hewitson's* case (1) is sufficient for the purpose.

In other words, the whole insistence of the noble lord, Lord Buckmaster, in that case (as, indeed, the Court of Appeal, whose judgment was affirmed in the House of Lords) was that it was the duty of this man, in order that he might be properly rested and, I suppose, some supervision might be exercised over him, unless he had a particular licence to do otherwise, to sleep in a particular hostel provided by the employers. Those were the facts of the case, and in that case the man truly satisfied the requirements which has been stated in so many of the cases that, in the performance of a duty under his contract of service, he was found in the place where the accident occurred.

With every respect to the learned county court judge in this case, I do not feel inclined to base my conclusion here upon the fact that this man was found in the highway. If this were a case comparable to *Brentnall's* case (2), if this man had a duty to go to a hostel so that it was an implied term and part of his contract that he should spend the night there, then I think, on the authorities and on common reason, the normal method of going from that approved place to his work or back again might well be said to be something done in the course of his employment. I think there is no reason to suppose that if, in *Brentnall's* case (2), the man, in the exercise of his duty which, as Lord Buckmaster said, extended from the time he left Woodford in the morning until he returned to it at night, had slipped on the highway in Sheffield between the hostel and the railway station, and not within the curtilage of the hostel, it would have made any difference. The real test here, and I think, the learned county court judge puts the real test to himself—although he asks the question whether this

man had any greater rights than any other citizen on the highway—is this: Was he, at the time of the accident, doing something which he was employed to do?

So far as the findings of fact are concerned, all that the learned county court judge finds in his obligations, which, I think, disagreeing with Mr. Shakespeare, he quite clearly says may be obligations after or before the time when he is doing his actual work, which is indicated by what is called booking on and off, and which were not to go too far away and to leave his address with his employers. I do not think it is possible, on those facts, to say that he was at these particular lodgings, or was in the street leaving those particular lodgings, in the performance of any duty under his contract of service, or that he was acting in the course of his employment. It was open to him to lodge where he liked, and there is no evidence to show that there was even a duty upon him to make any provision so that he could be called upon in an emergency during the night between the time of signing off and signing on again, other than leaving his address with the company. It is one thing to leave an address with the company, but it is quite another thing to be under a contractual obligation to be at that address when required. I can find no evidence in this case, beyond the obligation to leave an address with the company, of any obligation on this man to be at that address at any particular time. It may be that if he persistently absented himself from that address they might say he had not given them the right address, and that the right address was the cinema or wherever else he spent his evenings; but unless they gave him that address—and that question was not raised—it is a fallacy to read into what was proved in this case any obligation to be at the place where he had given an address in order that he might be called upon in an emergency.

On this matter I will simply read from the evidence of Mr. Hill, who says this:

> I leave my address on time sheet on Monday night. If address changed leave note or mark on time sheet. It is usual procedure so that company can find you.

There is no suggestion that he felt he was under any obligation to be during the evening, or all the evening, at the address which was given. He says:

> We make our own arrangements—sleep where we like—company make no arrangements—entitled to sleep anywhere. After I book off I am free till I book on again, except for emergency,

which I take to mean that if they do succeed in finding him he cannot refuse to serve. Nor does the applicant go any further; he says:

> I had left address at station. Three nights a week I stay there. I should tell foreman if I changed address. Don't know if name is entered in book, except for booking on.

In other words, as it seems to me, this man was merely in those lodgings

at Swansea because it was necessary that he should stay the night in Swansea as a consequence of his employment.

In this respect I think this case is not very dissimilar from that of *Philbin* v. *Hayes* (3). There an employer was carrying out certain constructional work in a village where there was no sleeping accommodation for the large number of men employed on the work, and to provide accommodation for the men the employer erected huts. The employer then advertised for workmen and stated that sleeping accommodation would be provided at 2*d.* per night, although there was no obligation upon the men to sleep in the huts. One of the workmen was sleeping in one of the huts when it was blown down during the night and he was injured. There it was held by the learned county court judge that this injury did happen in the course of the man's employment, but in this court that decision was reversed. It is pointed out in the judgment of Swinfen Eady, L.J., at p. 92, that

> He was not living in the hut upon any term of contract for his employer's benefit that he should be there. The man was given the choice, and was as free as possible to come or go. Counsel for the applicant urged that there was a difficulty in obtaining lodgings in the village. That I quite accept, and, of course, the man could only obtain such lodging as was available, but if he could obtain accommodation elsewhere suitable to his means, he was perfectly free to avail himself of it. The employer had no right to make him live in the hut. In my opinion the unfortunate accident that happened to this man, in the circumstances I have mentioned, was not an accident that happened in the course of his employmen t

And Bankes, L.J. and Neville, J., are of the same opinion. Neville, J., at p. 93, says this :

> I think he was no more doing something within the scope of his employment when sleeping in this hut than he would be sleeping in a lodging.

For these reasons I am of opinion that the learned county court judge was right in coming to the conclusion to which he did come, and the appeal fails.

Greene, L.J. : I agree. Mr. Shakespeare's criticism of the decision of the learned county court judge was in substance this : that he did not imply into the contract of service a term under which he says the man was working, and that that is the true test which he should have applied. The term which Mr. Shakespeare says the learned county court judge should have implied into the contract was to this effect : "You, the employee, shall have your resting-place, or choose your resting-place, in some place sufficiently near to make it practicable for you to perform your duties." In my opinion it is quite impossible, upon the facts of this case, to imply any such term. The fact that you cannot perform your contract unless you are in a particular place at a particular time is no justification, in my view, for saying that it is an implied term of the contract that you shall choose such a resting-place as to make it possible for you to be at that place at that time. If an employee

under his contract of service is bound to present himself at ten o'clock every morning at a particular place, he does not break his contract by being 200 miles away at half-past nine ; all that he has done is that he has put himself in such a position that he cannot perform his contract. His breach of his contract begins, and begins only, when, at ten o'clock, he fails to present himself. I myself, on the facts of this case, and quite apart from a further difficulty which I shall mention in a moment, find myself unable to imply any such term in this contract, either at the Swansea end or at the Oxford end of the journey. I cannot myself see any greater justification upon the facts for implying such a term at the Swansea end than there would be for implying it at the Oxford end. This man, according to the evidence, had been doing this trip for some years, and he had always stayed at the same lodgings at Swansea. Supposing a week before the accident he had moved his home from Oxford to Swansea, and had continued to do the same journey in precisely the same way, I do not know on what ground it could be said that a similar accident taking place in Oxford would have entitled him to compensation. I myself cannot see how the circumstance that his home happens to be at Oxford is really a justification for implying into this particular contract, the express terms of which we know, any such term as is suggested. I do not for one moment mean to say that there may not be contracts where the implication of such a term may be justified ; all I am saying is that on the terms of this contract, as found by the learned county court judge, I can find no justification for making any such implication.

But the matter does not rest there, because the implication—which, be it observed, is affirmative in form—appears to me to be inconsistent with the actual findings of the learned county court judge. The learned county court judge, in the passage which my Lord has read, summarises the contractual position in words which I will venture once more to read, in order that my point may be clear. He describes first of all the rights of the workman, and he then proceeds to define his obligation ; the distinction is a just one, and the learned county court judge, in my opinion, was acting perfectly rightly in drawing that distinction. The rights of the workman are thus described :

> His right under his contract of service was after arrival at Swansea to choose any lodgings in reasonable proximity to his work, to exercise an unfettered right in spending his time between signing on and signing off, and to get to the scene of his work by any route or any method of locomotion he might choose to select. His obligations under the contract of service were to leave his address with his employers, not to go too far away, and to sign on at the company's premises (where his duties lay) at the scheduled hour.

By the phrase : "Not to go too far away," I think the learned county court judge is referring to the choice of his lodgings ; "not to lodge

too far away," would appear to be what he means. It will be observed that the obligation is respect of locality is negative in form, and is so found by the learned county court judge. It appears to me that, where there is in the contract of service a negative obligation during the period when the actual operations of work have ceased, and that negative obligation is not to go outside a certain area, it is quite illegitimate to say that it necessarily follows from that that all the time that the man spends inside the area is spent in the course of his employment. There is a real distinction between the two things. If the man's contract is that he shall be in a particular place, or in a particular area, I can well understand an argument that, so long as he is there, he is doing something which he has contracted to do. If, on the other hand, during a period of rest or holiday his obligation is not to go outside an area, it seems to me impossible to say that it necessarily flows from that, that his action in remaining within that permitted area is something done in the course of his employment.

I will illustrate what I mean by this example. Suppose a man is entitled under his contract of service to a fortnight's holiday a year, and it is a term of the contract of service that during his holiday he shall not leave the British Isles, it would be quite impossible to say that while he, in pursuance of that obligation under the contract, refrains from going outside the British Isles, his holidays are spent in the course of his employment. The answer is that they are not. In staying in the British Isles he is not performing his contract; what he is doing is that he is not breaking it, which is quite a different matter. The distinction in other matters and other branches of the law may not be a very important one, but when it comes to this particular statute, where it must be shown that the accident arises in the course of the employment, I venture to think that this distinction is a real one. I, for one, am not prepared to extend the principles which have been laid down to cover the proposition that a man who, after his day's work is over, is put on terms not to go outside a certain area, is thereby entitled to say: "While I am in that area during my off hours, or my hours of rest, I am acting in the course of my employment."

Of course, it would not follow from that argument, even if it were accepted, that every accident which happened to the man while he was within the permitted area would be one entitling him to compensation, because he would still have to prove that the accident arose out of his employment. But, taking the essential fact which has to be proved: that it was in the course of the employment, I find it quite impossible to say that on the facts of this case, as found by the learned county court judge, the accident arose in the course of the employment. I am unable to draw the inference which Mr. Shakespeare invites us to draw; first, because I find no justification for doing it on the facts of this case;

and secondly, because in my opinion it is not consistent with the facts as found by the learned county court judge; and further, the facts as found by the learned county court judge do not go far enough to justify a conclusion that the accident took place in the course of the man's employment. I agree that the appeal should be dismissed.

SCOTT, L.J.: I agree, and I only add a word or two, because I think it is the type of question upon which it is rather difficult to express oneself clearly and, at the same time, to keep one's propositions limited to the facts of the case.

The essence of the learned county court judge's judgment here—and I agree with the way in which he has approached the question and his conclusions—is to consider when the employment on which the man was employed when on active duty terminated each day; and then to consider whether, in the interval between that moment and his coming back to active employment the next day, he was in any sense continuing to be in the course of his employment, or whether his employment was in any sense continuing. The learned county court judge comes to the conclusion on the evidence that it was not so continuing; and, to my mind, the clearest way of seeing why that conclusion was right is this. The learned judge says he signed off on arrival at Swansea at a particular time, and signed on again the next morning at another particular time. Those two prepositions, "off" and "on," to my mind really explain his finding. When the learned county court judge says he signed off, he meant that he was free to occupy his time for his own purposes in any way that he chose; his employment was not continuing, and, therefore, he was free. If he was completely free, there is an end of the matter on the decided cases, because it is quite plain that he was not then doing anything, or being in any place, in the course of his employment.

It is said on behalf of the applicant that, because he had left an address where he could be found if wanted in case of emergency, his employment was continuing. It is precisely there that I think the argument is fallacious. As I understand the contract of employment, it was this: "You shall do your active work under the orders of the company on the trains between the time you sign on and the time you sign off, and then you will be completely free until the time comes to sign on again; subject only to this condition: that we reserve the right to call upon you to resume your employment in the case of emergency on receiving notice from the railway company; and you must undertake, as a term of the contract generally, that you will give an address to the company to facilitate the giving of notice to you in case of emergency." The mere obligation to keep the railway company supplied with an address does not, in my view, justify the inference that the employment was continuing during the period off duty. It leaves the man wholly free to do what he likes with his own time, subject only to this, that

his right to treat his time as his own might be terminated if the railway company, in case of emergency, tell him that his services are required and, therefore, he has to resume his employment. Until a notice of emergency is actually received by the man it does not seem it is possible to say that the employment is continuing any more at what I will call an out station than at a home station—where it is conceded by counsel for the appellant that obviously the man would not then be in the course of his employment—because his employment would not begin until he got to the station for the purpose of signing on. For these reasons I agree with the judgments that have been delivered by the other members of the court.

Appeal dismissed with costs. Leave granted to appeal to the House of Lords.

Solicitors: *Pattinson & Brewer* (for the appellant); *A. G. Hubbard* (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

Re RICARDE-SEAVER'S WILL TRUSTS, MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LTD. *v.* SANDBROOK

[Chancery Division (Luxmoore, J.), **March 12, 1936.**]

Will—Contingent interest carrying intermediate income—No payment to be made to beneficiary—Beneficiary entitled to payment under statute—Trustee Act, 1925 (*c* 19), *s.* 31 (1) (*ii*).

The testatrix by her will directed a fund to be accumulated. She expressly directed that no payment from the fund should be made to the beneficiary during a certain period. If the beneficiary died during that period the fund was to fall into residue. The gift was one which would carry the intermediate income :—

Held: the terms of the Trustee Act, 1925, s. 31 (1) (ii) imposed a statutory duty on the trustees to pay the income of the fund to the beneficiary upon the beneficiary attaining 21 during the period and the provision in the will to the contrary would then become ineffective and the statutory duty would prevail.

[**EDITORIAL NOTE.** The point here also arose in *Re Spencer*, [1935] Ch. 533, Digest Supp., but the gift in that case was not within the terms of Trustee Act, 1925, s. 31 (3) so that the decision in that case upon this particular point was not necessary for the determination of the case. This case is, therefore, the first binding authority upon the point, and it is now quite clear that sect. 69 of the Act is restricted to powers given by a will and that the trusts of a will, if they are in conflict with the statutory direction to pay in Trustee Act, 1925, s. 31 (1) (ii), will be overridden by the statute and ineffective. It will be noted that in this particular clause the words used are "the trustees shall pay . . ." whereas in clause (i) the words are " the trustees may, at their sole discretion, pay . . ."

For the Law on this Point, see HALSBURY, Hailsham Edn, Vol. 14, pp. 352, 353, para. 661, and for the Cases, see DIGEST Supp., Executors, Nos. 5251 (*a*) *et seq.*]

Case referred to :

(1) *Re Spencer*, [1935] 1 Ch. 533 ; Digest Supp.

SUMMONS for directions, by the executors and trustees under the will of Gladys Ricarde-Seaver deceased, asking for the determination of the following question :

Whether notwithstanding the words "it being my wish that no payment be made to the said John Peter Sandbrook" contained in clause 5 of the said will of the said testatrix the plaintiffs should pay the income of the accumulations directed to be made in such clause of the said will to the defendant John Peter Sandbrook from his attaining the age of twenty-one years until he becomes absolutely entitled to the accumulated fund therein mentioned or dies in the lifetime of the said Margaret Sandbrook and before the expiration of twenty-one years from the death of the said testatrix.

The material part of clause 5 of the will was as follows :—

Secondly, during the term of twenty-one years from my death, if Margaret Sandbrook the mother of John Peter Sandbrook and the said John Peter Sandbrook shall so long live (it being my wish that no payment be made to the said John Peter Sandbrook during the lifetime of the said Margaret Sandbrook) yearly and every year to receive the sum of £100 free of duty and accumulate the same by investing the same and the resulting income thereof in any investments authorised by law to trustees and upon the expiration of the said term of twenty-one years or upon the death of the said Margaret Sandbrook whichever shall first happen to hold the accumulated funds in trust for the said John Peter Sandbrook absolutely and thereafter also to pay to him free of duty an annuity of £100 during the remainder of his life provided always that if the said John Peter Sandbrook shall be under the age of twenty-one years or shall die in the lifetime of the said Margaret Sandbrook and before the expiration of the said term the accumulated funds and the investments representing the same with all unexpended income thereof shall sink into and form part of my residuary estate.

C. R. Havers, for the plaintiffs.

E. H. Bodkin, for the defendant, J. P. Sandbrook.

Eric V. E. White, for the defendants, the Eugenics Society, and for Mrs. E. G. Murray.

Wilfrid M. Hunt, for the defendant, Miss Ursula Williams.

Hon. B. L. Bathurst, for the defendants, the Foundling Hospital.

F. Baden Fuller, for the defendants, Dr. Barnardo's Homes National Incorporated Association.

E. H. Bodkin (for the first defendant) : The summons asks for directions on one point, namely, whether the Trustee Act, 1925, s. 31 (1), clause (ii), overrides the words in the will "no payment be made to the said John Peter Sandbrook," and the plaintiffs should pay the income of the accumulations to him. The accumulated fund is £100 richer each year and there is the income of the fund up to that time. The section applies and the income should be paid to J. P. Sandbrook. (*Re Spencer* (1).)

Eric V. E. White (for the second and third defendants) submitted that

sect. 69 was applicable and that the powers applied so far as a contrary intention was not expressed in the instrument creating the trust. The words of the will express a very clear intention.

Luxmoore, J.: But the Act says "notwithstanding."

Wilfrid M. Hunt (for the fourth defendant): It would be a startling thing if the effect of the Act were to override the provisions in the will, as the intention of the will is plain.

Luxmoore, J.: The question I have to decide is: "What is to be the destination of the income of a fund directed to be accumulated by the testatrix under the provisions of clause 5 of her will." [His Lordship referred to the clause.] One thing is plain that the income of the fund goes to John Peter Sandbrook. It is plain on the part of John Peter Sandbrook: (i) that he is only contingently entitled to the capital until he attains the age of twenty-one; (ii) that he is entitled to the income of the fund so far as it has already been accumulated, and so far as the future income of the fund is concerned, and he is so entitled under the provisions of the Trustee Act, 1925, s. 31. [His Lordship read the section.] The words are plain. In the present case, there is no doubt whatever that the limitation of the trust does carry intermediate income. I take it that sect. 69 has no application to the present case. Sect. 31 imposes upon the trustees a statutory duty to pay, and that is quite the proper provision. The decision I have come to on my view of the reading of the Act seems to me to be in accordance with the words which I find in the section. In my opinion, it is in accordance with the decision of my brother Clauson in *Re Spencer* (1), and if I had been tempted to take a different view as to the intention of the Act to what was taken by him in that case, I should have been bound by his decision. I follow it with no less reluctance because I am in complete agreement with him.

C. R. Havers (for the plaintiff): Will your Lordship make a declaration to pay the accumulations to the defendant John Peter Sandbrook?

Luxmoore, J.: Yes. The trustees are bound to pay, notwithstanding any direction to the contrary. Costs must come out of the residue.

Solicitors: *Torr & Co.*, agents for *J. A. Simpson, Coulby & Drabble*, Nottingham (for the plaintiffs); *Scadding & Bodkin* (for the defendant, J. P. Sandbrook); *Reid, Sharman & Co.* (for the Eugenics Society and Mrs. E. G. Murray); *Rubenstein, Nash & Co.* (for Miss Ursula Williams); *Long & Gardiner* (for the Foundling Hospital); *H. B. Nisbet & Co* (for Dr. Barnardo's Homes National Incorporated Association).

[*Reported by* W. K. Skrivener, Esq., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* ELIAS COHEN AND JULIUS COHEN.

[KING'S BENCH DIVISION (Lawrence, J.), **March 17, 1936.**]

Revenue—Stamp duty—Conveyance on sale—Series of transactions—Finance (1909-10) Act, 1910 (c. 8), s. 73.

At a sale by auction the defendants purchased six dwelling-houses in lots, the consideration in respect of four of the lots being in each case less than £500. Six separate contracts of sale were signed and six abstracts of title delivered. In respect of the four lots, four separate conveyances were made :—

HELD : the transactions were separate and independent matters although related by time and place and effected by the same parties, such relation being merely casual and not constituting a "series of transactions" within the Finance (1909-10) Act, 1910, s. 73. In order that transactions shall form a "series," there must be interdependence between them.

[**EDITORIAL NOTE.** The Stamp Duty Office have for some years acted upon a rule that any transaction between two or more parties in which a binding contract is entered into before a former transaction between the same parties is completed by the execution of a conveyance is one of a series. In the present case the sale being by auction and the properties being different lots in the same auction the matter would seem to be within the rule which hitherto has been acted upon by the authorities. It will be noted that the decision here is upon the facts of the particular case. While this is no doubt legally correct it would be more convenient in a case of such common occurrence as the stamping of documents, if a strict rule (such as that which the authorities previously adopted) were available for the guidance of practitioners.

FOR STAMP DUTY ON CONVEYANCES, see HALSBURY, 1st. Edn., Vol. 25, Sale of Land, pp. 444-451, paras. 804-819 ; and FOR CASES, see DIGEST, Vol. 39, pp. 278-285, Nos. 621-671.]

Cases referred to :

(1) *Emmerson* v. *Heelis* (1809), 2 Taunt. 38 ; 39 Digest 260, *435*.
(2) *James and Chapman* v. *Shore* (1816), 1 Stark. 426 ; 40 Digest 287, *2483*.
(3) *Baldey* v. *Parker* (1823), 2 B. & C. 37 ; 39 Digest 368, *73*.
(4) *Lewin* v. *Guest* (1826), 1 Russ. 325 ; 40 Digest 159, *1277*.
(5) *Roots* v. *Dormer* (*Lord*) (1832), 4 B. & Ad. 77 ; 39 Digest 260, *436*.
(6) *Casamajor* v. *Strode* (1834), 2 My. & K. 706 ; 40 Digest 257, *2231*.
(7) *Holliday* v. *Lockwood*, [1917] 2 Ch. 47 ; 40 Digest 257, *2233*.
(8) *Kimbers & Co.* v. *Inland Revenue Commissioners* (1935), 51 T.L.R. 421 ; Digest Supp.

CASE stated by consent for the opinion of the court pursuant to R.S.C. Ord. 34, r. 1, and Ord. 68, r. 2.

The Solicitor-General (*Sir Donald Somervell, K.C.*) and *J. H. Stamp* for the informant.

Neville Laski, K.C., and *Alter M. Hurwitz* for the defendants.

LAWRENCE, J. : The question that I have to decide in this case is what is the meaning of the Finance (1909-10) Act, 1910, s. 73, as applied to the circumstances of this case in which the defendants attended an auction sale on Sept. 27, 1934, and at that auction made separate bids

for separate lots offered there in respect of dwelling-houses and other premises, namely, lots 3, 4, 5, 6, 7, 8; all belonging to the same vendors. The defendants' bids were accepted, and each of the six lots were separately sold to the defendants and, of those, four were sold for less than £500. Then the question arose whether those conveyances are to be stamped under the Finance (1909-10) Act, 1910, s. 73, as forming part of a larger transaction or as forming a series of transactions.

Sect. 73 reads as follows:

The stamp duties chargeable under the heading "Conveyance or Transfer on Sale of any Property" in the Stamp Act, 1891, Sched. I, ... shall be double those specified in that schedule: provided that this section shall not apply to the conveyance or transfer of any stock or marketable security as defined by sect. 122 of that Act, or to a conveyance or transfer where the amount or value of the consideration for the sale does not exceed £500 and the instrument contains a statement certifying that the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds £500.

The instruments contained certificates that they did not form part of the same transaction or series of transactions the consideration of which exceeded £500. This question is now submitted for the opinion of this court under that section.

The contentions made are these. The Solicitor-General contended that there are three essentials to constitute a series within the meaning of sect. 73: (1) It must be a series from the point of view of the taxpayer and the taxpayer is the purchaser as is shown by sect. 15 of the Act. (2) The series must consist of conveyances on sale. (3) The series must be at or about the same time, and he deduces this principally from the fact that the section provides for a certificate to be included in the conveyance. On the other hand, Mr. Laski contends that the word "series" cannot be read in that wide sense, and that there must be in the sort of series referred to in this section some interdependence between the individual transactions forming part of the series. He has referred me to a number of cases which show that the buying of lots at auctions form separate contracts and only relate to each other so as to be in equity one contract in circumstances which show that one bid depends upon the buying of the other lots. He has referred me to *Emmerson* v. *Heelis* (1); *James and Chapman* v. *Shore* (2); *Baldey* v. *Parker* (3); *Lewin* v. *Guest* (4); *Roots* v. *Lord Dormer* (5); *Casamajor* v. *Strode* (6); *Holliday* v. *Lockwood* (7).

In my judgment, having regard to the object of the section, which is in my view to prevent the evasion of duty, the words "series of transactions" must be given some limitation other than the limitation which the Solicitor-General puts on them, namely, that it must be a series taking place at or about the same time. It is true that the word

can be used in that wide sense and in its original meaning may bear the import of succession. But I do not think that when a purchaser enters into two or more sales at or about the same time that that constitutes a series within the meaning of the section. In my mind an auction sale raises a somewhat different consideration than a conveyance on sale by negotiation. It may be that a number of conveyances on sale between two parties at or about the same time would constitute a series. But so far as it is necessary for me to express my view upon this matter, I hold that there cannot be a series unless there be some interdependence between the separate transactions. Whether there is interdependence depends upon the facts of each case. I am of opinion that there is no series of transactions in this case within the meaning of the section.

The case of *Kimbers & Co.*v. *Commissioners of Inland Revenue* (8) is in some ways a much stronger case than the present. There, although the contract for the sale of land was conditional on the building of the house, yet FINLAY,.J., held that it was not a transaction forming part of a larger transaction. At least that is what I think he held, although the Solicitor-General contends that what was decided there was the question: "Is this one transaction or is it a part of a larger transaction?" If that be so, perhaps it removes the real relevance of the case. But I think that the fact that in the present case the parties to each conveyance were the same, that the time was closely the same, that the place was contiguous, is a casual matter which does not constitute a series within the meaning of the section, and I hold that there must be interdependence between the transactions forming part of the series, and I hold that in this case there is no interdependence.

Judgment for defendants.

Solicitors: *Solicitor of Inland Revenue* (for the informant); *Sebag Cohen & Co.* (for the defendants).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

R. *v.* BISHIRGIAN.
R. *v.* HOWESON.
R. *v.* HARDY.

[Court of Criminal Appeal (Lord Hewart, L.C.J., Macnaghten, and du Parcq, JJ.), **March 16, 17, 18, 1936.**]

Criminal law—Prospectus—False in a material particular—Larceny Act, 1861 (*c.* 96), *s.* 84.

The appellants were associated in the publication of a certain prospectus, which invited subscriptions for shares in an old-established company of metal dealers and brokers. Part of the sum to be subscribed was to be used in acquiring a controlling interest in another company which was said to have similar interests. The prospectus intimated that "the substantial amount of the additional working capital which will now become available should assist materially in extending both the volume and the scope of the company's activities." In fact, the company to be acquired was engaged in a gamble to make a corner in pepper :—

Held : there was such a partial and fragmentary statement of fact in the prospectus that the withholding of that which was not stated made that which was stated false, and the publication of the prospectus was an offence within the Larceny Act, 1861, s. 84.

[**EDITORIAL NOTE.** It had already been decided in *R.* v. *Kylsant*, [1932] 1 K.B. 442, that the whole of a prospectus must be considered in deciding what impression would be produced by it, and in the absence of an active misstatement of fact there must be "such a partial or fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false." These last words, of course, come from the leading case of *Peek* v. *Gurney* (1873), L.R. 6 H.L. 377, 402. The statements in the prospectus, which is the subject of the present case, seem largely to be concerned with the prospective development of the company, whereas in *R.* v. *Kylsant* (*supra*) there was a definite statement as to past profits which upon all the facts was held to be misleading. In the present case little seems to have been said in the prospectus as to the past, and the decision seems to rest upon the fact that the appellants stated an intention upon their part to extend both in volume and scope a genuine business, whereas in fact they intended to prosecute what was nothing more than a sheer gamble.

For False Statements by Directors, see HALSBURY, Hailsham Edn., Vol. 9, p. 531, para. 909 ; and for the Cases, see DIGEST, Vol. 15, pp. 939-940, Nos. 10346-10356.]

Cases referred to :

(1) *R.* v. *Kylsant* (*Lord*), [1932] 1 K.B. 442 ; Digest Supp.
(2) *Re Olympia, Ltd.*, [1898] 2 Ch. 153, affd. sub nom. *Gluckstein* v. *Barnes*, [1900] A.C. 240 ; 9 Digest 644, *4257*.
(3) *Re Christineville Rubber Estates, Ltd.* (1911), 81 L.J. Ch. 63 ; 9 Digest 111, *525*.
(4) *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301 ; 9 Digest 490, *3215*.
(5) *McKeown* v. *Boudard-Peveril Gear Co.* (1896), 65 L.J. Ch. 735 ; 9 Digest 109, *491*.
(6) *Components' Tube Co.* v. *Naylor*, [1900] 2 I.R.1 ; 9 Digest 116, *566* (*ii*).

Appeal of Garabad Bishirgian, John Henry Charles Ernest Howeson,

and Louis Hardy, convicted at the Central Criminal Court on Feb. 21, 1936, the indictment containing the following counts :

(1) Knowingly making a false statement in a prospectus with intent to induce persons to become shareholders contrary to the Larceny Act, 1861, s. 84.

The particulars of the offence are stated in these terms :

That Garabad Bishirgian, on Sept. 3, 1934, being a director of a certain public company, to wit, James & Shakespeare, Ltd., made, circulated or published or concurred in making, circulating or publishing, a certain written document, to wit, a prospectus, which he knew to be false in a material particular with intent to induce persons to become shareholders in the said company.

Howeson and Hardy were charged with aiding and abetting Bishirgian in that crime.

(2) Bishirgian, Howeson and Hardy between Jan. 31, 1933, and Sept. 7, 1934, conspired together and with other persons whose names are unknown, that the said Bishirgian, being a director of the public company of James & Shakespeare, Ltd., made or published or concurred in making or publishing a certain written statement which he knew to be false in a material particular with intent to induce persons to become shareholders in a certain company, contrary to the Larceny Act, 1861, s. 84.

Sir Patrick Hastings, *K.C.*, *C. L. Henderson*, and *A. A. H. Marlowe*, for the appellant Bishirgian : Bishirgian is an Armenian by birth, but has conducted a business in the city for many years. He was naturalised before the war. His character was testified to by witnesses who were most likely to feel bitterly towards him, and there may have been a real miscarriage of justice in this case. The idea was originated in 1934 that pepper was a good commercial enterprise. The world's supply and the world's demand, according to past experience, were practically constant, and it was known and accepted at all material times prior to the issue of the prospectus that 12,000 tons per annum was the world's supply and the world's consumption. Bishirgian, on behalf of Williams Henry & Co., began to buy pepper, and by the time the prospectus of the company was issued, their commitments amounted to 11,000 tons. Williams Henry & Co. were the principals, and Bishirgian was their broker. It was decided that they should combine with James & Shakespeare, Ltd. This company was to increase its capital and to acquire the shares in Williams Henry & Co. and also to acquire the business of Bishirgian. The only substance of the particulars is that there was an omission to specify the position with regard to shellac and pepper. That was really the gravamen of the charge. It was said that the omission to state this position made the prospectus false. But the normal trade of a business such as this was to have a future speculative position. In previous years there had always been open commitments. In one year Williams Henry & Co. lost £200,000, but in the following year they made a profit of £300,000. Where there is a business of a speculative nature,

the question of whether it is more or less speculative is a question of degree. The prospectus could not be read as saying there were no open commitments. It was accepted in this prospectus that there were open commitments. The only thing left out was how open and how speculative they were. It is the underlying point of the appeal that that does not render the statement in the prospectus false within the meaning of sect. 84. It was a forensic question as to what ought to have been put into the prospectus. The business was believed to be sound and the prosecution did not suggest otherwise. [He referred to *R.* v. *Kylsant* (*Lord*) (1).]

Sir William Jowitt, K.C., and *G. D. Roberts*, for the appellant Howeson: The right way to test the matter is as follows. The offence under sect. 84 of the Act consists in the positive offence of making a positive statement, and is to be differentiated from sects. 82 and 83 where one finds the negative element. It was laid down in *R.* v. *Kylsant* (1) that it is necessary to have a contradiction between that which is stated and that which is implied by necessary implication, and this case differs from *R.* v. *Kylsant* (1) in that respect. Howeson had never seen the minutes of Williams Henry & Co., and had never been in the office. He never saw the accountants. He had no reason to suppose that the accountants had not all the documents before them relating to pepper. The learned judge did not point out to the jury that this was a side-show of Howeson because he was such a busy man. Throughout all 1934, Howeson was under no financial embarrassment at all. At the end of June all the businesses were doing well. The learned judge did not put to the jury Howeson's case that the purchase of pepper, after the 8,000 tons, was unnecessary to sustain the market. The learned judge cut at the root of the strong point we had that it was at the worst a case of the prospectus becoming false and not being false at the beginning.

W. T, Monckton, K.C., and *W. Frampton*, for the appellant Hardy: Hardy had no shares in the company except as a nominee. After the date of the prospectus he bought some preference shares in James & Shakespeare, Ltd., in his wife's name. Hardy had nothing at stake at first, but he put money into it afterwards. It was never suggested to Hardy that the explanation was that from the first he had intended to keep the transactions out of the minute book. The gravamen of the charge against Hardy was that he caused the omission from the minute-book of all references to pepper. The learned judge said it was of great importance whether the gamble began in February or later. It was Hardy's point that the things were not in the minute book, and there was no suggestion that the gamble had begun then. In the summing up, the matter was introduced by the learned judge as his own point. There was no omission which falsified the prospectus in a material particular. [He referred to *R.* v. *Kylsant* (1), *Arkwright* v. *Newbold* (4), *McKeown*

v. *Boudard-Peveril Gear Co.* (5), *Components' Tube Co.* v. *Naylor* (6), *Re Christineville Rubber Estates, Ltd.* (3).]

The Attorney-General (*Sir Thomas Inskip, K.C.*), *Eustace Fulton*, and *L. A. Byrne*, for the Crown: Although Bishirgian had never been responsible for issuing a company prospectus before, he had had a large experience of financial business. It was said that Bishirgian took over the liabilities in respect of these transactions to the extent of £90,000, but he had to do it. It was not desired to deprive the appellants of anything which was to their credit, but it is not a fact that Bishirgian took upon himself a liability which he was in a position to avoid. These transactions were not of the nature of forward contracts, but were undertakings in the nature of a gamble in which it was hoped to make a profit out of the purchasers, either wholesale or retail. As regards the minute books, there was no entry in the minute books; therefore nobody could know. The whole of the case was put to the jury as to whether these transactions were a gamble and whether the omission of any mention of the gamble made the prospectus false. There is all the difference in the world between legitimate trading and a gamble. It was pointed out to the jury that these people might have seen that in April and May far larger quantities of pepper had come in than in the corresponding months of 1933. Everyone admits that the figures were reasonable on June 30, 1934. If they had stopped there, they might have been reasonable. This was very different from saying that these figures might not have been the beginning of the transaction which became 11,000 tons.

With regard to Howeson, it was said that, although he gave authority to buy up to 6,000 tons if necessary, he did not know the purchases were more, and therefore he was not in a position to know what was said in or omitted from the prospectus. But he knew about the 2,000 tons. Also, he knew about the 6,000 tons. He said he was amazed afterwards to see how much was being bought. But he knew that a gamble had been set on foot, and that James & Shakespeare, Ltd., would have to provide the finance. Hardy also was concerned in all the transactions along with Bishirgian.

Lord Hewart, L.C.J.: [His Lordship stated the nature of the offence.]

The jury, after a protracted trial, convicted the appellants on both counts of the indictment, and Bishirgian and Howeson were then sentenced to 12 months' imprisonment in the second division, and Hardy to 9 months in the second division. From that conviction, all the appellants now appeal. In addition to the particulars contained in the indictment, two sets of further particulars were delivered and handed to the appellants. The first of these is a document entitled "Particulars of omissions which made the prospectus of James & Shakespeare false

in a material particular." It may be as well to read this document. It consists of two paragraphs :

(1) The prospectus states that James & Shakespeare, Ltd., had the option to purchase 101,000 ordinary shares of £1 each of Williams Henry & Co., and had a right to subscribe and exercise that option for 49,000 un-issued shares of the same company at 25*s.* each.

It was the intention of the directors immediately after the allotment of the shares they were offering to the public to exercise that option and to acquire the un-issued shares for £162,250. The prospectus, by purporting to set out the nature of the business and the assets and the liabilities of Williams Henry & Co., omitted to state that Williams Henry & Co. had forward commitments at the date of the prospectus amounting in shellac to £399,079 and in pepper to £967,046, liabilities which in the event of Williams Henry & Co. failing to meet these obligations would make the shares which James & Shakespeare, Ltd., were acquiring valueless. There was, in fact, no specific mention in the prospectus of either shellac of pepper.

(2) The prospectus also states that if was intended to acquire the valuable good-will and organisation of the metal production department of Bishirgian & Co.

It omitted to state that Bishirgian & Co. had acted as brokers for Williams Henry & Co. in the purchase of shellac and pepper, and that James & Shakespeare, Ltd., would, by acquiring that part of its business, become brokers for Williams Henry & Co. in any future purchases which might be necessary in view of its heavy existing commitments for it to make in shellac and pepper, in order to keep up the prices on the market, and that in default of its principals, James & Shakespeare, Ltd., would be liable for such commitments as brokers.

There followed another document which is headed in this way: "Particulars showing how the omission in the prospectus made it false in a material particular," and this again is divided into two paragraphs. First, the prospectus is alleged to be false as a whole ; and, secondly, the prospectus gave the impression to any member of the public reading it that he was being invited to invest in an old-established metal-dealers' and brokers' business which with a view to consolidating and enlarging its business and obtaining adequate capital desired to acquire two other businesses carrying on ordinary businesses in metal and commodities. These were the charges and these were the particulars.

It may be well also to read the section of the statute with which both counts in the indictment had to do, Larceny Act, 1861, s. 84, which is as follows :

Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor. . . .

Our attention has been directed in the course of the argument on behalf of the appellants to many cases, including and antecedent to, the recent

case of *R.* v. *Kylsant* (1). It has been said, and said correctly, that the decision of this court in that case laid down no new law. It merely applied to the facts of that particular case law which for a long time was well settled. The judgment of the court began by referring to various other authorities which, in the view of this court, supported the view of the law which had been contained in the summing up of WRIGHT, J., as he then was. The first of the authorities cited was the judgment in the well-known case of *Gluckstein* v. *Barnes* (2). In that case, LORD MACNAGHTEN said, at p. 250 :

> It is a trite observation that every document as against its author must be read in the sense which it was intended to convey. And everybody knows that sometimes half a truth is no better than a downright falsehood.

Passages from earlier judgments have been cited to us, all to the same effect.

Such is the law applicable to such a case as this. It is perfectly clear that the expression of the law varies, but the meaning remains identical. If a statement is impugned under this section, it is because there is such a partial and fragmentary statement of facts that the withholding of that which is not stated makes that which is stated false. There must be such a non-disclosure as to render the document misleading. Or, again, in the words which EVE, J., employed in *Re Christineville Rubber Estates, Ltd.* (3), at p. 66 :

> The non-disclosure is the non-disclosure of something the disclosure of which would falsify some statement in the prospectus.

The argument here on behalf of the Crown is not merely that that condition is satisfied, but that it is satisfied *a fortiori* where the contention is that the concealment of that which has been concealed renders the whole statement a lie.

The case for the Crown here is not that in this or that particular the prospectus which was put forward for the purpose of attracting from the public large sums of money was in some accidental or incidental way false. The case is that the very essence and function of this document was to mislead. It was a cheat from beginning to end. The way in which the learned judge in his extremely careful and complete summing up expressed the matter was plain enough for any jury fully to comprehend. He referred to the matter again and again. He put it in a very concise sentence at a very early stage.

> This document cannot be a false document merely because something is omitted. It has to go beyond that. The omission has to make that which is stated affirmatively untrue—untrue in the sense that it creates clearly and intentionally an impression and belief in the mind of the public which is wrong. If it does not, there is an end of the case.

He immediately added this :

Did the defendants know it was false ? Here again you have to be very careful, you have got to be precise. It is not enough to say they knew of the omissions. They have got to know and appreciate that it is false. In other words, if you are trying to describe a state of mind, it must be a state of mind which amounts to this : " Yes, I know that I have omitted something that ought to be there. I appreciate that this is making my prospectus false, and I know and appreciate that that prospectus will create a certain impression, an impression which is not true." It is not enough merely to say you are satisfied that they knew of the omission. It is not enough to say they knew it was an important omission. You must go further and say : " We are satisfied that they knew that the omission made that document a false one " in the way I have described it to you.

In the opinion of this court, that was a correct and fair direction upon the question of law.

The complaint which is made here by these appellants is that the prospectus—the document which is before the court—for preference shares and ordinary shares in James & Shakespeare, Ltd., was not false in any material particular within the meaning of the statute. The case for the Crown was that the evidence proved conclusively that the prospectus was false as a whole in that it gave an entirely false description of the business in which the public was being invited by the prospectus to invest its money. The public was invited by this prospectus to subscribe £300,000 for preference shares and £112,500 for ordinary shares in James & Shakespeare, Ltd., a company which was carrying on, as it said, a business in London as metal dealers and brokers, a business founded in 1844, and carried on interruptedly from that time. But the prospectus stated that the carrying of stocks on the London market for account of clients is essential to the successful development of the company's business which had been retarded in the past by the inadequacy of its resources. Out of the total amount for which subscription was being asked, £162,000 was to be used in acquiring a majority interest in a company called Williams Henry & Co., Ltd., a company with similar interests having important agencies and connections in the United States of America, India, and the Colonies. That was the only description given in the prospectus of the business of Williams Henry & Co., and the balance of the £412,500, after providing for the expenses of the issue—a balance estimated to be approximately £225,000—was to supply the additional capital resources, the inadequacy of which had retarded the successful development of the company's ordinary business. The words of the prospectus are : " The substantial amount of additional working capital which will now become available for that purpose—namely, the carrying of stocks on the London market for account of clients—should assist materially in extending both the volume and scope of the company's activities." It is contended by the prosecution that the prospectus, by that which it did state with regard to James & Shake-

speare, Ltd., and Williams Henry & Co., Ltd., and especially by contrast with what it omitted to state, gave, and was intended to give, an utterly false description of the business into which at that time the public was really, though it did not know it, being invited to put its money. Except for comparatively minor matters, there is really no dispute on the facts. The case made out was that the persons behind this prospectus were really at this time engaged not in ordinary business, but in a gamble described indeed in various phrases, but always the same thing: a gamble to make a corner in pepper, or to control the price or to command the market. That gamble had been conducted by the company Williams Henry & Co., a private company belonging wholly in different proportions to Bishirgian and Howeson, and they were advised by a memorandum from a Mr. Walker that inasmuch as 12,000 tons was the average annual amount of the consumption of white pepper, an interest in 2,000 to 3,000 tons would provide a decisive influence on the trend of prices. By June 30, 1934, Williams Henry & Co. had bought 2,460 tons of pepper, Mr. Bishirgian acting as broker for that company. There followed on July 24 a decision to buy pepper up to 6,000 tons.

A great deal of the discussion in this court has exhibited once more the fallacies which may arise from a mere misuse of terms. The particular term which lays the foundation for the main fallacy on which the appellants rely is the term "future commitments." Anyone who is at all acquainted with business and anybody who reads about these companies with intelligence may be taken to know that some future commitments there must be. So the learned judge rules, and indeed it is obvious, because they are future commitments, although they ought no doubt to be entered in a properly kept minute book, they may fail to find a place in accounts duly audited, and for this reason: that future commitments do not become material for the work of the auditor inasmuch as the time has not yet arrived when the commitments have crystallised either into profit earned or into a loss incurred. The future commitments of a normal business are one thing. The future commitments of a colossal gamble are different not merely in degree, but in kind. Sir Patrick Hastings in his argument developed the proposition that inasmuch as it is apparent, not from express words, but from a reasonable inference, that there must be some future commitments, it is really not material for the purposes of the present case, at any rate, to examine the dimensions of those commitments. Given the fact, the quantum, it is said, does not matter. There, it seems to me, lurks the fallacy. Future commitments of a normal business are one thing. The airy speculations of a colossal gamble are quite a different thing. It is not a difference of degree, but it is a difference of kind. As the learned judge explained in the course of his summing up, by using apt illustrations to make the point perfectly clear, there is not merely some difference, but all the difference between

future commitments of normal trade and future commitments of an attempt to corner. The financing as it is called is different. The risks are different. And to advertise a business as an ordinary business seeking development when money is really being asked to feed and supply an ambitious gamble is simply deceit. The argument is not that in this or that particular this prospectus was untrue. The argument is that its whole purpose and effect were to deceive.

It is said that no suitable words could have been included into the prospectus to repair the omission. It is not quite clear what that proposition means. If suitable and true words had been there, it might well be that the prospectus would not have been of much use. Suppose there had been a note: "N.B.—You are apparently being invited to subscribe in a well-known old-established ordinary business carrying on its operations on approved lines. You are really being invited to trust your money to a gambling speculation to make a corner in pepper." It would have been the truth, but the utility of the prospectus might have been extremely small. That was the case and the main facts in this case, protracted as it was, are not in dispute. There may be some dispute as to the precise moment of time when the gamble began, but it was all antecedent to the prospectus, and the purpose for which this money was wanted, and the purpose to which it was, in fact, applied was the bolstering up of a very ambitious scheme—which failed—to control the pepper supply of the world.

In order to ascertain the question whether this document was false in a material particular or in all material particulars, one may ask oneselves this question: "If the facts had been revealed or even clearly indicated, would any man of sense have put his money into it?" That question is sought in argument and to some extent in the evidence to be answered on the part of the appellants by the statement: "the appellants themselves put money into it and themselves took large personal risks. They believed, and they said, that they were on a good thing." No doubt there was a time when they entertained sanguine expectations of the enormous operations upon which by degrees they had entered. That does not alter the nature of the operation. The public was not told what the good thing was. The public was told that the good thing was quite a different good thing and really, when one analyses, after hearing all the argument, the excuse which is offered on behalf of these appellants, it comes to no more than the excuse of the office boy who takes a half-crown from the till because he has a good thing for the Grand National. Morally and legally the transactions are on the same footing. The dimensions greatly differ.

On behalf of these appellants it is contended that the judgment in the *Kylsant* case (1) does not apply. Of course, the facts in this case are not identical with those in the case of *R.* v. *Kylsant* (1). The question

is not whether the facts are identical, but whether the well-settled principles exhibited in that case apply. In our opinion they clearly apply here and apply *a fortiori*.

It is said that the learned judge mis-directed the jury. I have read the summing up more than once, and I am not going to presume to apply complimentary epithets to it. It examines the facts of this case with completeness and care. It states the law with precision and accuracy. There have been individual complaints of this or that passage in the summing up according to the well-known and perfectly legitimate method of putting every sentence in a summing up under a microscope to see if there is something with which fault can be found. We are satisfied that this summing up, taken as a whole, and one part being read with another part, was eminently fair, and that there is no ground on which it can be alleged that there was affirmative mis-direction or that kind of mis-direction that consists in omission. It is quite true that in one passage the learned judge, dealing with the date at which the gamble, the attempt to corner, must be taken to have started assumed that he himself was the author of a particular suggestion. With all respect to the learned judge it is by no means clear that that is correct. On the contrary, there are certain passages in the questions asked by the learned Attorney-General which would have been needless if it were true that it were left to the judge to suggest a particular date for the inception of the gamble. We have listened with attention to all the individual complaints which are offered. In our opinion there is no substance in them. There is nothing which affects the validity of this verdict. The case was amply treated. The law was clearly and accurately stated, and these appeals are dismissed. The terms will run from the date of the sentences. The period during which they had been treated as appellants should be included in the course of their sentences.

Solicitors: *Barlow, Lyde & Gilbert* (for the appellant Bishirgian); *Clifford-Turner & Co.* (for the appellant Howeson); *Lloyd & Armstrong* (for the appellant Hardy); *Director of Public Prosecutions.*

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

SIMMONS *v.* THE MAYOR, ETC., OF THE BOROUGH OF HUNTINGDON.

[King's Bench Division (Horridge, J.), **March 18, 1936.**]

Negligence—Bathing pool—Diving board near shallow water—No notice or warning.

The plaintiff was the father and administrator of a schoolboy, aged 15 years, who was killed by breaking his neck when diving from a diving board maintained by a borough council in a swimming pool under the control of the council. The accident was due to the insufficient depth of the water, of which no warning was given either by attendants or by the exhibition of a notice :—

Held : the placing of the diving board at a point where there was an insufficient depth of water, accompanied by the failure to give any warning, amounted to a trap.

[**EDITORIAL NOTE.** This case shows the application of well-recognised principles of the law of negligence to circumstances which have now become of such common occurrence that the views of the court thereon is a matter of considerable importance. Local authorities and others who provide bathing facilities are bound to make sure that the safety of bathers is reasonably assured and that there is nothing in the nature of a trap. No doubt there will be considerable divergence of opinion as to what is a safe depth into which a person of average diving ability can dive and providers of pools and such places will be well advised to see there is ample depth or issue a proper warning of the shallowness of the water.

For the Law as to Traps, see HALSBURY, 1st Edn., Vol. 21, Negligence, pp. 388-390, paras. 656, 657, and for the Cases, see DIGEST, Vol. 36, pp. 41, 42 Nos. 247-258.]

Action for negligence causing death under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934.

Philip Simmons, aged 15, a schoolboy, was in camp with a boy scout troop at Hinchingbrooke Park, Huntingdon. On Saturday evening, Aug. 3, 1935, he and a number of other boy scouts, obtained their scoutmaster's permission to visit the swimming pool, which is known as "the Huntingdon Bathing Place," under the control and management of the defendants. The pool is, in fact, a backwater of the River Ouse, and is equipped with a spring diving board. The party reached the pool at about 7.25 o'clock, and were admitted free of charge. Simmons was ready first and went to the diving board and dived into the water. He was at once seen to be in difficulties and died some 25 hours later from a broken neck.

The board was 3 feet above the surface of the water, which at that point was 3 feet 3 inches deep.

The defendants alleged that both before and when he (Simmons) was on the diving board, he was warned by the bathing-pool attendant, who was employed by defendants, to be careful as the water was shallow, but this was denied.

It was proposed to ask witness what the deceased said had caused his injuries, but an objection thereto was upheld by the judge.

G. Russel Vick, K.C., and *G. O. Slade*, for the plaintiff.

Van den Berg, K.C., and *Gerald Howard*, for the defendants.

HORRIDGE, J.: In this case, in my opinion there was what amounted to a "trap." The diving board, being placed where it was, was a suggestion that there was proper depth of water into which to dive. It was that trap which resulted in the death of this boy, which I hold was caused by his striking his head on the bottom of the pool. I accept the evidence of the boy scouts who were called in support of the plaintiff's case, and I hold, as a fact, that no warning was given by the bathing-pool attendant. As to the damages, there was a reasonable expectation of pecuniary advantage accruing to the plaintiff in the future, which I assess at £100, damages for pain and suffering of the deceased I assess at £50, and the special damages at £21.

Solicitors: *J. Page Thomas* (for the plaintiff); *Bell, Brodrick & Gray*, agents for *J. W. Winter*, Huntingdon (for the defendants).

[*Reported by* C. ST. J. NICHOLSON, ESQ., *Barrister-at-Law.*]

SPINK (BOURNEMOUTH) LTD. *v.* DOUGLAS OLIVER SPINK.

[CHANCERY DIVISION (Luxmoore, J.), **March 10, 1936.**]

Trade—Covenant in restraint of trade—Entered into at termination of employment—Transfer of shares in limited company—Consideration paid by company—Severability—Companies Act, 1929 (*c.* 23), *s.* 45.

The defendant and his brother were directors of the plaintiff company, which carried on business at B. In 1934, by an agreement between the defendant, his brother, and the company, the defendant covenanted, *inter alia*, to sever his connection with the company and for a period of 5 years not to carry on or assist in carrying on within a radius of 10 miles of B. a business similar to that of the plaintiff company. It was further agreed that in consideration of £250 and the release of all sums owing to the company by the defendant he would transfer to his brother all his shares in the company. This £250 was paid by the company's cheque. Assuming the covenant in restraint of trade was valid, there was an admitted breach in Feb. 1936:—

HELD: (i) the agreement was not invalidated by the fact that it was entered into at the end and not at the beginning of the defendant's connection with the plaintiff company.

(ii) the covenant in restraint of trade was severable from the covenant to transfer the shares, and if the payment of the £250 by the plaintiff company contravened the Companies Act, 1929, s. 45, any illegality arising therefrom did not affect the validity of the covenant in restraint of trade.

[**EDITORIAL NOTE.** It would seem that this case is properly treated as a case of employer and employee, though the relationship between the parties was not as precise as it might have been. No doubt it will be unusual to encounter restrictive

covenants entered into at the close of a period of employment, since there would be a considerable possibility in the circumstances of there not being a proper consideration to support the restriction. Where an employee is released from a period of service this difficulty will not arise and a restriction it would seem may be validly imposed.

As to such Covenant by an Employee, see HALSBURY, 1st. Edn. Vol. 27, Trade and Trade Unions, p. 557, para. 1081, and for the Cases, see DIGEST, Vol. 43, pp. 20, 28, 29, Nos. 131, 209-221.]

Motion for an interlocutory injunction in the terms hereinafter set out. The facts and arguments are set out in the judgment.

Sir Gerald Hurst, K.C., and *Charles Luxmoore*, for the plaintiffs.

W. P. Spens, K.C., and *H. S. G. Buckmaster*, for the defendant.

Luxmoore, J.: This is a motion by the plaintiffs :

to restrain the defendant until the trial of this action or further order from carrying on business or assisting in carrying on the business either as a director, partner, manager, servant or agent of a garage proprietor or motor car seller or motor car distributor within a radius of ten miles from the General Post Office, Bournemouth, in breach of his covenant contained in an agreement dated Sept. 25, 1934, and made between the defendant of the first part, John Roland Spink of the second part, and Spink Brothers (Bournemouth), Limited, of the third part.

There is no dispute of fact in the case. The sole question that I have to determine is whether the covenant is one which can be legally imposed.

The facts appear to be as follows: Before August 1932 the defendant, Douglas Oliver Spink, and his brother, John Roland Spink, were carrying on business at Bournemouth as garage proprietors. They acted, I think, as sole distributing agents for two or three well-known motorcar firms, Daimler, Lanchester, and B.S.A. Products. They carried on that business in partnership together. On Aug. 27, 1932, the plaintiff company was incorporated. It is a private company incorporated for the purpose of acquiring the business of the two Spink brothers. The capital of the company is small; its nominal capital is £10,000, divided into 5,000 preference shares and 5,000 ordinary shares. On the incorporation of the company a gentleman named Allcroft was, in substance, brought into partnership with these two brothers. Mr. Allcroft took the 5,000 preference shares and I think 1,000 of the ordinary shares. Only 1,000 further ordinary shares were issued. 500 of them were issued to Mr. J. R. Spink and his wife in proportions which are not material, and the other 500 to the defendant, Douglas Oliver Spink, and his wife, and again the proportions in which they took them are not material to the present case. The company, as I have said, was a private company, and, among other provisions, Mr. John Roland Spink, Mr. Douglas Oliver Spink, and Mr. John Russell Allcroft were to be the first directors of the company. They were to be permanent directors, and each of them was to be entitled to hold that office so long as he should live unless he became disqualified as provided by the articles.

The company, having been formed and having acquired the business of the two brothers, continued to carry on for some considerable time. The two Spinks were the joint managers, and Mr. Allcroft became the secretary.

Now, in the autumn of 1934 there were some disputes between the parties. What they were I do not think it is material to consider, but on Sept. 25 an agreement was entered into between Mr. Douglas Oliver Spink and his brother and the plaintiffs. That is the agreement which the plaintiff company alleges has been broken. By the evidence, Mr. Douglas Oliver Spink agreed forthwith to resign his directorship of the company and also to resign his position as an employee of the company, that is, as manager of the sales agency. The consideration for his so doing is expressed to be the payment by the company of £100, and by clause 2 of the agreement it is provided that:

> As and from the date hereof Mr. Douglas Spink shall sever all his connection with the company and shall not do anything which might lead the customers of the company or those dealing with the company to suppose that he has any interest therein or has any connection therewith

any longer. Then by clause 3 it is provided that Mr. Douglas Spink, the defendant,

> agrees that the payment of the said sum of £100 shall be in full and final satisfaction, settlement and discharge of all his claims against the company and Mr. John Spink, and particularly his claims in respect of wages, wages in lieu of notice, commissions, director's fees, and expenses.

Then clause 4 contains the provision which is relied on in this action:

> Mr. Douglas Spink hereby further agrees in consideration of the payment of the said sum of £100 that he will not for a period of five years from the date hereof carry on business or assist in carrying on the business either as a director, partner, manager, servant or agent of a garage proprietor, motor car seller or motor car distributor within a radius of ten miles from the General Post Office, Bournemouth.

Then there is a further agreement which is a separate agreement:

> Mr. Douglas Spink hereby further agrees that he will forthwith transfer his said holding of 325 £1 fully paid ordinary shares in the company to Mr. John Spink in consideration of the sum of £250.

Then the company releases Mr. Douglas Spink (and this again is part of the consideration)

> from all claims and demands against him in respect of accounts owing to the company and particularly in respect of a sum of £75 owing by him to the company.

That is the whole of the agreement, and that was entered into on Sept. 25, 1934. The consideration of £100 was paid by the company. The shares in question were transferred by Mr. Douglas Spink to his brother, and the evidence shows that cheques for £250, the consideration for the sale of the shares, were paid by the company.

Now, nothing happened until Feb. 8 of this year. On that date Mr. Douglas Spink agreed to accept the office of sales manager with a firm carrying on precisely the same kind of business as is carried on by the plaintiff company, called Henlys (1928), Ltd., who carry on their business at Bournemouth. There is no question that that business is within the restricted area, and there is no question but that the nature of the business is such that if Mr. Douglas Spink takes up his employment with the company there will be a breach of clause 4 of the agreement to which I have just referred. But it is said that the agreement is invalid, as being contrary to public policy, because it is in the nature of an agreement between an employer and an employee, and is made, not when the employee is entering into the service of the employer, but on his leaving. So far as the particular facts of this case are concerned, I do not think the agreement is really in the nature of an agreement between an employer and an employee at all; it is much nearer the case of a partner in a business going out of that business and entering into an agreement at the end of the partnership; but personally it does not seem to me to make much difference which way it is looked at. Of course, in all cases where there is something in the nature of a sale of a goodwill, covenants of that particular kind are looked at with less stringency than when they are entered into between employer and employee. But even assuming this to be a case of an employer and an employee, I certainly see no reason why this should be a bad covenant, assuming that it had been entered into at the beginning of the employment. Quite obviously, where a man enters into the employment of another he may subject himself to some restrictions. The question in all the cases is whether the restriction is wider than is necessary for the protection of the covenantee. In the present case, if this had been an agreement between an employer and an employee at the outset, I do not think anyone could have suggested that this would be wider than was necessary for the employer's protection. Now, can it become a bad and invalid covenant because it is entered into in circumstances which amount to a release by the employer of the employee of his liability to continue in his service where a consideration is paid? I can see no ground, and certainly none of the authorities which have been quoted to me appear to touch any such question. I cannot understand that public policy requires that a person who is seeking to be released from his employment cannot obtain that release and a payment to himself as consideration for his giving up his service and the entering into of a proper restrictive covenant as part of the bargain. I do not see how such a covenant can affect adversely any member of the public or the person who, with his eyes open, takes the consideration and gives the covenant. In my judgment, the covenant is a perfectly proper covenant, and one which can be properly enforced. I see nothing illegal or contrary to public

policy in its terms at all. Then it is said that the agreement cannot be enforced because on the evidence it is shown that the sum of £250 was paid by the company instead of by John Roland Spink, and it has been argued that such a payment is within the prohibition laid down by the Companies Act, 1929, s. 45. Sect. 45 provides that:

> subject as provided in this section, it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of, or in connection with a purchase made or to be made by any person of any shares in the company.

It is quite true that if the £250 was lent by the company to John Roland Spink for the purpose of enabling him to fulfil his obligation under the agreement, the provisions of sect. 45 would have been applicable. I I do not know the circumstances, and I am not told the circumstances under which the £250 was paid. If £250 was owing to Mr. John Roland Spink by the company at the time, there was no objection to the company paying that money by their cheque, and there was no contravention of the section at all, but the agreement to purchase the shares was an agreement by John Roland Spink with his brother, and is a perfectly severable agreement from the rest of the agreement in question. So far as it was an agreement between the two brothers, there is nothing whatever in the section to suggest that that agreement becomes illegal or unenforceable if the company provides any part of the purchase price consideration. The position simply is that if the company has contravened the provisions of sect. 45, it has subjected itself to liability to a fine under sect. 45 (3).

In my judgment, there is no ground for refusing the relief which the company seeks in this action by reason of anything which may have happened within the provisions of the Companies Act, 1929, s. 45, and in the result I think the plaintiffs are entitled to the relief which they seek by their notice of motion.

The parties have agreed that the hearing of the motion shall be treated as the trial of the action, and in those circumstances I grant to the plaintiffs an injunction during the remainder of the period of five years limited by the agreement of Sept. 25, 1934, restraining the defendant

> from carrying on business or assisting in carrying on the business either as a director, partner, manager, servant or agent of a garage proprietor or motor car seller or motor car distributor within a radius of ten miles from the General Post Office, Bournemouth, in breach of his covenant contained in an agreement dated Sept. 25, 1934.

The defendant must pay the costs of the action.

Solicitors: *Clifford-Turner & Co.* (for the plaintiffs); *Peacock & Goddard*, agents for *Luff, Raymond & Williams*, Wimborne Minster (for the defendant).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

Re MACNAMARA, DECEASED, MACNAMARA *v.* MACNAMARA

[Chancery Division (Bennett, J.), **March 11, 12, 1936.**]

Settlements—Capital and income—Compensation for malicious damage.

A tenant for life unimpeachable for waste of an estate in Ireland and subject to Irish law was awarded £4,400 compensation for damage to the settled property. The compensation, which was awarded by a commission of inquiry set up by agreement between the government of the Irish Free State and the British Government, was in the nature of a gratuity and was not by law recoverable by the owners of the property injured. The tenant for life in fact only received £2,600, the balance being retained by the Irish Free State Government in respect of an unascertained liability of the tenant for life for Irish income tax :—

Held : (i) by Irish law the sum awarded by way of compensation was capital money and was held by the tenant for life as a trustee for the trustees of the settled estate.

(ii) in the circumstances the liability was the tenant for life was limited to £2,600, the only sum received in respect of the award.

[**EDITORIAL NOTE.** The question for decision in this case is raised in such a way that both English and Irish decisions have to be considered. Since the English decisions upon the matter are few and do not all deal with the matter in quite the same way the case becomes of some importance on what is always a difficult question, i.e., whether a payment is a casual profit of the tenant for life or capital money to be paid to the trustees of the settlement.

For the Law on the Point, see HALSBURY, 1st Edn., Vol. 25, Settlements, pp. 607, 608, para. 1072 ; and for the Cases, see DIGEST, Vol. 40, p. 656, Nos. 1954-1956.]

Cases referred to :

(1) *Gage & Roper* v. *Pigott & De Jenner*, [1919] 1 I.R. 23 ; Digest Supp.

(2) *Re Williams' Settlement, Williams Wynn* v. *Williams*, [1922] 2 Ch. 750 ; 40 Digest 656, *1955*.

Summons to determine whether a certain sum paid as compensation for malicious injury to the settled property should be treated as capital, or as casual profit in the absolute disposition of the deceased tenant for life.

W. S. Norwood for the plaintiff.

R. F. Roxburgh, K.C., and *Evelyn Riviere*, for the first defendant, the remainderman.

C. E. Harman, K.C., and *Roger Turnbull*, for the other defendants.

Bennett, J. : The question is as to a sum of £4,400, which, for the purposes of answering this question, must be assumed to have been paid to the testator, Henry Valentine Macnamara, who was, when it was paid to him, tenant for life of certain lands in Ireland. The question is whether that sum of £4,400 belonged to him or whether he held it as a trustee for the persons who were entitled in succession to the lands, of which he was tenant for life.

The circumstances under which the money was paid to him are stated in an affidavit that has been filed on behalf of the defendants, other than Francis Macnamara, the affidavit being the joint one of Mr. Hickman and Mr. Marnan, which was filed on Feb. 12, 1935. Para. 3 of that affidavit states that the testator was tenant for life without impeachment for waste of some estates in Ireland known as Doolin Carron and Ennistymon. Para. 5 states that in the course of disturbances in Ireland in the year 1920 and the year 1921, houses on those estates were damaged by rebels or other lawless persons and that the testator then being tenant for life obtained from the county court judge of the County of Clare certain sums in respect of the damage occasioned by the malicious acts, which are those referred to. That compensation was obtained under the law in force in Ireland before 1923, and in 1923, according to para. 9 of the joint affidavit, an Act of Parliament was passed, which is in these terms:

> The right to institute proceedings under the said Malicious Injuries (Ireland) Acts in respect of any injuries committed on or before July 11, 1921, or to enforce any decree in respect of such injuries was taken away by sect. 1 of the said Damage to Property (Compensation) Act, 1923, which is a statute of the Irish Free State.

All the injuries in respect of which the testator had recovered, what I may call, judgments, were in respect of injuries before July 11, 1921, so that his rights under those decrees were extinguished, but it was provided by the Act of 1923 that the section should not apply to or prevent the presentation or prosecution of a claim to or before any commission of inquiry in respect of an injury to which the section applied, that is, injury committed on or before July 11, 1921. In para. 10, it is stated that:

> A commission of inquiry (hereinafter called the Compensation (Ireland) Commission) was set up in the year 1922 by agreement between the government of the Irish Free State and the British Government to review county court decrees for compensation in undefended cases and to determine and report to the governments what sum would be just and reasonable in the circumstances of each case investigated. Compensation awarded by the Compensation (Ireland) Commission was in the nature of a gratuity and was not by law recoverable by the owners of the property injured.

Para. 11 of the joint affidavit states that in the year 1923 the testator presented and prosecuted a claim before the Compensation (Ireland) Commission for the injury to the settled property mentioned in para. 5 and there is exhibited to the affidavit a document "F.W.G.H.1.," a copy of what has been referred to as the award made by that commission. The award is a document addressed by the secretary of the commission to the solicitors of the testator and in it the secretary states that he was directed to inform the testator's solicitors that the compensation commission having reached the determination set out thereunder, are

reporting accordingly to the British and Irish governments, and the determination the commission had reached was to the effect that in respect of the property of which the testator was tenant for life, the commission had determined the compensation as fair and reasonable at the sum of £4,400 and interest.

For the purposes of answering this question, it is to be assumed that the whole of that sum was paid to the testator. The question is whether he was entitled to keep it for himself as his own property, or whether it was received by him as a trustee for the persons entitled under the settlement.

The defendant, represented by Mr. Roxburgh, contends that the testator was a trustee of that money and that he, representing now the person who on the death of the tenant for life of the testator became entitled to an estate in inheritance, is entitled to have that sum paid to his client out of the testator's estate.

The remaining defendants, represented by Mr. Harman, contend that the sum of money in question was a sum to which the testator was absolutely entitled. The question has to be determined by Irish law because the settlement is a settlement of Irish land. The testator was domiciled in Ireland and the money was paid under the direction of an Irish commission. All parties are agreed that the law which applies is the law of Ireland. Accordingly, there are affidavits made by Irish lawyers as to what the law of Ireland with regard to the destination of this sum of money is, and for the defendant represented by Mr. Roxburgh, there is the affidavit of Sir Henry Arthur Wynne. He says in the first of his two affidavits that he has been unable to find any case which expressly decides the point in question, and in the last sentence of the affidavit he says:

> In my opinion the Irish Free State courts would hold that the case is distinguished from certain mortgage cases—which he has referred to—and that in a case such as this, I think the principle in cases like *Gage & Roper* v. *Pigott & De Jenner* (1) would be followed and that the compensation award would be held to be capital and not to belong to the tenant for life.

The lawyer who has made an affidavit which has been filed on behalf of the other defendants is Mr. John Martin Whitaker. He agrees with Sir Henry Arthur Wynne that there is no express authority in Ireland which governs the case. In para. 12 of his affidavit, he says:

> I am of opinion that in cases of this nature the principles of equity administered by the courts of the Irish Free State are exactly the same as the principles of equity administered by the English courts. Where a question arises in a case in the Irish Free State as to the equitable principles which should be applied thereto and there is no Irish decision on the question, it is the invariable custom for counsel to refer to and base their arguments upon the English decisions relating to the matter (and indeed so closely identified are the systems of equity administered in each country that even where there are Irish decisions relating to the matter, but

such decisions are not expressly decisions on the question under consideration, it is usual for counsel to reinforce his arguments by reference to the English authorities) and though such decisions are not binding on them the Irish judges almost invariably accept the principles of equity as laid down in such English decisions as being the principles of equity applicable in the Irish Free State and would, in my opinion, do so in the present case. The view above expressed is confirmed by reference to the two Irish cases above referred to and the further Irish case of *Gage & Roper* v. *Pigott & De Jenner* (1), referred to by Sir Henry Wynne in his affidavit (and to which case I propose to refer more fully hereafter). In all these cases it will be noted that in so far as the principles of equity involved in such cases are concerned, both the arguments of counsel and the judgments of all the judges are founded on English decisions.

Then he does not presume to state on that view of the Irish law what the English law on the question would be. That is replied to by a further affidavit of Sir Henry Wynne, in which he says—and this is deposing to Irish law as a matter of fact—that where there is a contrast between a decision of the Irish Free State Court of Appeal or of the former Irish Court of Appeal and a decision of the High Court of England, the decision of the Irish Court of Appeal would be followed in the Irish Free State court. That is how the evidence on the question of fact of Irish law stands.

Mr. Roxburgh contends that in principle in Ireland the question is settled in favour of his client by the decision of the Irish Court of Appeal in *Gage & Roper* v. *Pigott & De Jenner* (1). That was a case in which ornamental timber had been cut and taken away by a body which was called the Homegrown Timber Committee. It was cut on settled land of which there was a tenant for life, who was unimpeachable for waste. The timber had been cut and taken away for military purposes and the sum of £630 had been paid to the trustees of the settlement by way of compensation for the timber that had been cut and taken away by the Homegrown Timber Committee. The question was whether that £630 was capital money to be retained by the trustees of the settlement or was a sum of money which the tenant for life was entitled to put into his pocket, and the Master of the Rolls and the Court of Appeal in Ireland both arrived at a conclusion that the £630 was capital money and, in my judgment, in arriving at that conclusion, they based themselves on this principle, that the sum of £630 was compensation paid by the Homegrown Timber Committee for an injury which they had done to the inheritance, an injury of a kind which the tenant for life, although not impeachable for waste himself, could not have done and that the compensation being for an act of that nature, it was inequitable for the tenant for life to take for himself the whole of that compensation and in equity it ought to be held in such a way as that it should be a compensation to everybody who had been injured for the injury which had been done to their respective rights; that, as it seems

to me, is quite plain from what is stated by O'Connor, L.J., on page 50.

It is said on the other side that is not an express authority upon the point, it is a decision upon quite different facts and there is an authority in England, a decision of Sargant, J., indistinguishable really in principle from the present case. That is the decision in the case of *Re Williams' Settlement* (2), a case in which Sargant, J., as he then was, decided that a sum of money which was paid under the Indemnity Act of 1920 to a tenant for life of settled land not impeachable for waste for damage done to a park forming part of the settled land was a casual profit which the tenant for life might retain for his own use. If the matter was being considered in England, and not being a decision of the Irish Court of Appeal, to which I have referred, and it had to be decided by a judge in England in a court of first instance, he would have been bound, I think, by the decision of Sargant, J., to hold that this sum of £4,400 was in the nature of a casual profit and as such would have been a sum of money that the tenant for life not impeachable for waste was entitled to retain, but the question has not to be decided in accordance with the law of England, it has to be decided in accordance with the law of Ireland. In principle I do not think it is possible to distinguish between the decision of Sargant, J., in *Re Williams* (2) and the decision of the Irish Court of Appeal in *Gage & Roper* v. *Pigott & De Jenner* (1). In those circumstances, upon the evidence of Sir Henry Wynne, I feel bound to arrive, as a matter of fact, at the conclusion that under the Irish law the sum of £4,400 is capital money and that as such it was held by the late tenant for life as a trustee for the persons who were trustees for the purposes of the Settled Land Act of the settlement if there were any at the time of the proceedings.

The second question to be decided is what sum or sums did the testator receive. In respect of injury to the settled estates awards were made of sums amounting altogether to £4,400. There was no legal liability upon the Irish Free State to make the payments; any sums they paid were payments *ex gratia*. What happened is stated in para. 13 and succeeding paragraphs of the affidavit of Mr. Hickman and Mr. Marnan, to which I have referred, and paras. 8, 9 and 10 of the affidavit of the plaintiff, filed on July 12, 1934. From para. 13 of the joint affidavit, it appears that: "The Irish Free State Department of Finance paid or credited to the testator or his assigns during the testator's life the said sums of " £4,400, omitting the immaterial figures. Before the award had been made the British Government had advanced to the testator £2,600. The Irish Free State Department of Finance paid the British Government £2,600 and charged that sum against the credit of £4,400, so that so far as that figure is concerned, it seems to me perfectly plain that the testator had £2,600 from the Irish Free State on

account of the £4,400 that had been awarded to him for injury done to the settled estates. As regards the balance of that sum, £1,800, there is a little confusion in the affidavit about figures, that is to say, a confusion between £1,800 and £2,140, but I think it is convenient to regard the sum which was dealt with as though it were £1,800. In para. 15 of the joint affidavit, it is said that:

> Income tax was payable by the testator during his life to the Commissioners of Inland Revenue for the financial year 1918-19 and for each subsequent financial year or part of a year down to the time of his death. The particulars of such income tax as matters stood at the testator's death is correctly set out

in an exhibit to which the deponent refers. Then para. 16 says:

> On Apr. 8, 1924, I, as the testator's solicitor, was notified by the Irish Free State Department of Finance that such department had paid over a sum of £2,264 3*s*. 8*d*. (which included the said sum of £2,140 17*s*. 3*d*. and the amount of certain other compensation awards) to the Irish Free State Commissioners of Inland Revenue.

The £2,140 17*s*. 3*d*. includes the £1,800. Then the deponent says: "I immediately informed the testator of this notification." That is all that is material for me to read in that affidavit. The account between the Irish Free State Department of Finance and the testator in which they had credited the testator with £4,400 was by those operations closed. There was no balance remaining in favour of the testator, the balance had been transferred to an account between the testator and the Irish Free State Commissioners of Inland Revenue. Up to that point the testator certainly had not had one penny of the £1,800.

The plaintiff in her affidavit in para. 8, after dealing with the advance to the testator of £2,600 by the British Government, says it

> was repaid by the Ministry of Finance, Irish Free State, to the British Government out of the said sum of £4,400 the balance of £1,800 being retained by the Irish Free State and appropriated in respect of the then unascertained liability of the testator for Irish income tax.

Then para. 9 says: "The testator never consented to such appropriation and made unsuccessful efforts to recover the said balance of £1,800." Then after the testator's death some agreement was come to between the Inland Revenue authorities and the testator's executors with regard to his liability to income tax. When one asks oneself the question as to whether the testator ever had this sum of £1,800, the answer, it seems to me, must be given in the negative, he never did have it, it was all the time kept by the Irish Free State authorities who were under no legal liability to pay it for the purpose of satisfying some liability which they said was due from the testator to the Irish Free State in respect of unascertained liability to income tax which the testater, according to the evidence, during his lifetime refused.

In those circumstances I do not feel I can hold that the testator had

the £1,800, the balance of £4,400, and I propose to answer the question by saying that the liability ought to be limited to £2,600, which is the only sum, in my judgment, the testator received in respect of the awards for injury done to the settled estate.

Solicitors : *Charles Stevens & Drayton* (for the plaintiff, and for the defendants other than the remainderman) ; *Henry F. Johnson & Son* (for the first defendant, the remainderman).

[*Reported by* Gerald A. Abrahams, Esq., *Barrister-at-Law.*]

HATHERTON *v.* COMMISSIONERS OF INLAND REVENUE.

[King's Bench Division (Lawrence, J.), **March 16, 1936.**]

Mines—Lease—Rent—Obligation to supply free coal—Finance (1909-10) *Act*, 1910 (*c.* 8) *s.* 20.

Under a mining lease the rent included an obligation to deliver a certain quantity of coal to the lessor or other such persons as they appoint and to their agents and to such person or persons as such agents shall appoint. The value of the supply of such coal was excluded from the assessment of rent for the purposes of the Mineral Rights Duty and Royalties Welfare Levy under the Finance (1909-10) Act, 1910, s. 20 :—

Held : the value of such supply of coal was wrongly excluded. "Rent" and "rental value" in the above section are not confined to rent as known at common law, but apply to every part of the consideration for the right to mine the minerals.

[**EDITORIAL NOTE.** The peculiarities of the remedy for the recovery of rent by self-help, viz., distress, has no doubt done much to make "rent" a term of art, and one to which many fine distinctions have been attached. The question here is whether these qualifications are to be applied to the same word used in a modern statute and in a section dealing with mining leases, where there are commonly reservations of a number of payments usually under the general term of rent. The decision that a wider meaning is to be given to the statutory use of the word is helped by authorities where a wider meaning has been given to the term.

For the Nature of Rent, see HALSBURY, Hailsham Edn., Vol. 18, pp. 158, 159, paras. 170, 171, and for the Cases, see DIGEST, Vol. 31, pp. 213-220, Nos. 3523-3577.]

Cases referred to :

(1) *Campbell* v. *Leach, Leach* v. *Campbell* (1775), Ambler, 740 ; 31 Digest 516, *6635.*
(2) *Re Moody and Yates' Contract* (1885), 30 Ch. D. 344 ; 40 Digest 177, *1468.*
(3) *Greville-Nugent* v. *Mackenzie*, [1900] A.C. 83 ; 34 Digest 611, *92.*
(4) *Morrice* v. *Antrobus* (1664), Hardres Rep. 325.
(5) *Anon.* (1695), 12 Mod. Rep. 73 ; 31 Digest 222, *3595.*
(6) *R.* v. *Pomfret* (*Earl*) (1816), 5 M. & S. 139 ; 38 *Digest* 477, *371.*
(7) *R.* v. *St. Austell* (*Inhabitants*) (1822), 5 B. & Ald. 693 ; 38 Digest 478, *373.*
(8) *Cardigan* (*Earl*) v. *Armitage* (1823), 2 B. & C. 197 ; 34 Digest 714, *992.*
(9) *Fancy* v. *Scott* (1828), 2 Man. & Ry. K.B. 335 ; 31 Digest 33, *1800.*
(10) *Doe d. Douglas* v. *Lock* (1835), 2 Ad. & El. 705 ; 34 Digest 667, *637.*

(11) *Re Roundwood Colliery Co., Lee* v. *Roundwood Colliery Co.*, [1897] 1 Ch. 373; 34 Digest 689, *819.*

(12) *St. Cross Hospital (Master, etc.)* v. *Howard de Walden (Lord)* (1795), 6 Term Rep. 338; 31 Digest 224, *3631.*

APPEAL of the Commissioners of Inland Revenue against the decision of the Referee appointed under the Finance (1909-10) Act, 1910, who decided that "the free coal in respect of which the assessment is made is not a rent within the meaning of the Statute."

The Solicitor-General (Sir Donald Somervell, K.C.) and *J. H. Stamp*, for the Commissioners of Inland Revenue, the appellants: In the Finance (1909-10) Act, 1910, rent and rental value are given a far wider construction than in landlord and tenant law. The scope of the definition in sect. 24 brings in every money payment and every other consideration other than money's worth for the leasing and mining of minerals. There are authorities in landlord and tenant law for saying that other payments besides money may be rent: COKE ON LITTLETON 142A; *Re Moody & Yates Contract* (2).

E. G. H. Weeks, for the respondent: Free coal cannot be rent. Rent must always be a profit. Rent must be reserved to the lessor. By clause 19 of the present lease the lessees are to supply coal "to the lessors or other such persons as they appoint . . . and to their agents or to such person or persons as such agents appoint." GILBERT'S TREATISE ON RENT, p. 54; COKE ON LITTLETON, 47A; Rent must be reserved in apt words: COKE ON LITTLETON, 47A, note 289; *Morrice v. Antrobus* (4); *Anon.* (5). Rent cannot be something *in esse*. It must be something springing up by reason of the lease. BROOKE'S ABRIDGMENT "OF RESERVATIONS," para. 46; COKE ON LITTLETON, 47A and 142A; *R.* v. *Pomfret* (6), at p. 141, per LORD ELLENBOROUGH. *R.* v. *St. Austell (Inhabitants)* (7), at p. 698, per ABBOTT, C.J.; *Cardigan (Earl)* v. *Armitage* (8); *Fancy* v. *Scott*, 1828 (9); *Doe d. Douglas* v. *Lock* (10), per DENMAN, C.J., at p. 743.

The Solicitor-General, in reply: The statute departs from the common law definition of rent. The most salient departure is the inclusion of licences in the case of a mining lease. Rent in the common law sense is rent for which distraint can be made: HALSBURY, Hailsham Edn., Vol. 10, p. 445, para. 554. Rent for which a distress can be made must be rent properly so called. Rent under the statute must be construed as consideration for the mining lease and is not what is distrainable rent at common law. A payment for a licence at common law is not rent at all, but it is included as rent under the statute: *Re Roundwood Colliery Co.* (11). As to the point that rent must be reserved by apt words: It would be very easy to escape taxation if all one had to do was to rely upon the use of inapt words.

Lawrence, J.: Is not the answer to that, that the Legislature should use sufficiently wide words ?

The Solicitor-General: My submission is that it has. The strict rule is a rule as to what words will convey the right of distress, and under the statute it is quite clear that the words "rental value" and "rent" are not co-terminous with cases where there is a right to distress.

As to the point that rent cannot be something *in esse*: *R.* v. *Pomfret* (6), *R.* v. *St. Austell* (*Inhabitants*) (7), *Campbell* v. *Leach* (1), *Greville-Nugent* v. *Mackenzie* (3), *Re Moody & Yates' Contract* (2).

The actual getting of the coal and turning it into a merchantable commodity involves a service and a service can be true rent. Bacon's Abridgment, Vol. 7, p. 5. The law as to reservation is correctly stated in Halsbury, 1st Edn., Vol. 18, p. 465, note (*q*), *St. Cross Hospital* (*Master, etc.*) v. *Howard de Walden* (*Lord*) (12), at p. 343. The statute does not use the word "rent" in its common law sense.

Lawrence, J.: In this case the points which have been raised before me are of some complexity. The question which I have to decide on appeal from the referee appointed under the Finance (1909-10) Act, 1910, s. 33, is whether the respondents have rightly been assessed to Mineral Rights Duty and Royalties Welfare Levy in respect of free coal supplied to them by lessees under clause 19 of a lease dated July 24, 1899, and under clause 3 (*d*) of a lease made in 1924. They have been assessed in respect of the value of coal which has, under the leases, to be supplied annually. The referee decided that the assessment was wrong.

The matter turns on the Finance (1909-10) Act, 1910, s. 20, which provides :

(1) There shall be charged, levied, and paid for the financial year ending Mar. 31, 1910, and every subsequent financial year on the rental value of all rights to work minerals and of all mineral wayleaves, a duty (in this Act referred to as a mineral rights duty) at the rate in each case of one shilling for every twenty shillings of that rental value.

(2) The rental value shall be taken to be :

(*a*) Where the right to work the minerals is the subject of a mining lease, the amount of rent paid by the working lessee in the last working year in respect of that right ;

and sect. 24 providing that :

the expression "rent" includes yearly or other rent, and shall, in addition to the meaning assigned to it for the general purposes of this part of the Act, be construed as including any fine, premium, or foregift, and any payment, consideration, or benefit in the nature of a fine, premium, or foregift.

The definition goes on to provide that the expression

"mining lease" means a lease for mining purposes, that is, for searching for, winning, working, getting, making merchantable, carrying away, or disposing of, mines and minerals, or purposes connected therewith, and includes an agreement for such

lease, or any tenancy or licence, whether by deed, parol, or otherwise for mining purposes, and the expressions "lessor" and "lessee" shall in addition to the meaning assigned to them for the general purposes of this part of this Act be construed so as to include respectively a licensor and a licensee.

It was contended by Mr. Weeks, on behalf of the respondent, in a most interesting argument that the words "rent" and "rental value" in this part of the Act refer to what is strictly called rent at common law, and that the essentials of rent at common law are that rent must be reserved to the lessor. Mr. Weeks contends that the rent named in these leases is reserved not to the lessor, but to the lessor's agents. Secondly, he says that rent must be reserved in apt words and that there are no apt words in the leases describing the supply of this coal as rent. Thirdly, he contends that rent cannot be a reservation of something *in esse*, that is, of something forming part of the land granted.

On the other hand, it is contended that the word "rent" is not used in the statute in the narrow sense of the common law, but in the wider sense of including part of the consideration for the granting of the leases. Considerable stress has been laid upon the second paragraph of the definition of rent and the definition of mining lease. Mr. Weeks, on behalf of the respondent, drew my attention to a number of authorities which I do not think it necessary for me to recite which seem to support the contention that rent according to the old authorities had the three essentials for which he contended. The Solicitor-General answered these contentions in the first place by contending that the word "rent" is not used in the strict sense, and in the second place by pointing out that in this case the supply of coal was reserved in fact to the lessor because it had to be supplied to his agents or nominees, and the only right reserved was to the lessor himself, and that the essentials upon which Mr. Weeks was relying was that the lease should not reserve any right to a stranger, and that this lease did not reserve a right to a stranger.

Mr. Weeks' next contention was that if apt words were not used, it would be open to every taxpayer to avoid payment on the grounds that apt words were not used. He further contends that the supply of free coal was not a matter of exception but of reservation. My attention has been drawn to three authorities. The first is *Campbell* v. *Leach* (1), where it was held that a power to get the best rent authorised trustees to get such rent as included the supply of corn. The second, the case of *Re Moody & Yates' Contract* (2), in which BRETT, M.R., treats the word "rent" as including the supply of minerals where he says at page 346:

I must go further and say whenever a rent in kind is reserved—such as the delivery to the landlord in an agricultural lease of a portion of the crops of hay, or in a mining lease of a part of the coals or minerals won from the soil—although it is a real rent, it does not fall within the statute, which applies only where there is a payment in money. In other cases, such as those which I have mentioned, rent is yielded or rendered, not paid.

Fry, L.J., uses words of similar import. They were saying in effect that such a provision in a mining lease provided for the rendering of a real rent. The third is the case of *Greville-Nugent* v. *Mackenzie* (3), in which Lord Halsbury points out that rent is a somewhat inappropriate word to use for payment made as consideration for the getting of minerals. He says at page 87 :

> whatever might have been the case originally, and I am not prepared to defend the logic of some of the reasons given in the earlier decisions, at all events for obvious reasons—and I think if the courts had the power by law to do it, they were most useful and cogent reasons—they have treated in this class of case the produce of the soil as including that which is in truth what Lord Cairns has described as the substance of the soil itself. In speaking of coal, for instance, we talk constantly about the "rent" and "royalty" of coal. The phrases are figurative : you pay rent in one sense, it is true ; but rent generally has been understood to be a return from the soil, and not to be a consumption or taking away of the soil ; whereas, of course, where the soil consists of coal and other minerals you are actually taking it away. But whatever may have been the original view of such questions, the matter has now become so perfectly well ascertained by a long course of decisions that wherever those general words are used and the question is whether the tenant for life is entitled to what, in one sense, is called the usufruct, but I suppose in more strict language would be called part of the soil itself—where you are dealing with minerals it has always been held, so far as I know, without doubt or question, for centuries that the proceeds of opened mines form part of that which may go to the tenant for life, and that he is entitled to take them as part of the proceeds of the soil.

In view of these decisions and in view of the language of sects. 20 and 24, I am of opinion that the assessment in respect of the supply of free coal was a proper assessment. It seems that the words of sect. 20 which impose a duty on all rights to work minerals not only under leases the consideration of which may be said to be rent, but include the imposition of duty on rights to work minerals arising under other forms of tenure. This view is emphasised and confirmed by the definition in sect. 24 [set out above]. It appears to me that the words "rental value" or "rent" as used in the statute are not to be confined to rent as known at common law, but as part of the consideration for the right to mine these minerals. I therefore hold that the appeal must be allowed.

Solicitors : *Solicitor of Inland Revenue* (for the appellants) ; *Hand, Morgan & Co.*, Stafford (for the respondents).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

BEYERS *v.* GREEN.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., and a Special Jury), **March 10, 11, 1936.**]

Marriage—Breach of Promise—Fraudulent concealment of previous marriage—Action long after pretended marriage.

The plaintiff and the defendant went through a form of marriage in 1922. The defendant had told the plaintiff that he had not previously been married, and in the pre-nuptial contract and marriage certificate he was described as a bachelor. In 1924 the defendant denied a suggestion that he was a married man. In 1932 he answered a further suggestion by admitting a Gretna Green marriage which he said had not been legal. The defendant had, in fact, been legally married in 1900, but he had not seen his wife, nor heard from or of her for about 22 years before he met the plaintiff. In an action for breach of promise and for fraud, the defendant contended that in 1922 he thought that his wife was dead and that he was free to marry, and he denied that he had fraudulently concealed the fact that he had been previously married. As regards the breach of promise, he relied on the Statute of Limitations.

The jury were directed that if the defendant had fraudulently concealed the fact that he was married and they were satisfied that the plaintiff did not know the true facts till within six years of the issue of the writ, they should find for the plaintiff. The jury found for the plaintiff and judgment was entered accordingly.

[EDITORIAL NOTE. The facts in this case are unusual in a breach of promise action. It has to be noted that the action was brought upon a claim for both breach of promise and fraud. As a general verdict was given, the matter remains upon whether the plaintiff is entitled to succeed in such an action if a claim is made solely for a breach of promise to marry.

FOR BREACH OF PROMISE OF MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 16, pp. 554-558, paras. 818-830, and FOR THE CASES, see DIGEST, Vol. 27, pp. 27-34, Nos. 30-92.]

Cases referred to :

(1) *Smith* v. *Selwyn*, [1914] 3 K.B. 98.; 1 Digest 63, *516.*
(2) *Lynn* v. *Bamber*, [1930] 2 K.B. 72; Digest Supp.
(3) *Spiers* v. *Hunt*, [1908] 1 K.B. 720; 27 Digest 26, *25.*

ACTION for breach of promise of marriage and for fraud.

The plaintiff, Anne Herold Beyers, met the defendant, Thomas Green, at Capetown in the autumn of 1921, through a matrimonial advertisement. She was then 19 years of age. The parties became engaged and went through a ceremony of marriage at Capetown on May 11, 1922. The plaintiff said in evidence that the defendant had told her he had not been married, and in the pre-nuptial contract and in the marriage certificate he was described as a bachelor. In 1924, the plaintiff's mother received an anonymous letter in which it was stated that the plaintiff was married to a married man. The defendant denied that this was so. In 1930, a son was born to them. In 1932, while the parties were staying at Blackpool, the plaintiff overhearing a conver-

sation between the defendant and another man, asked the defendant if he had been married before. He admitted that there had been a girl-and-boy affair, a Gretna Green affair, and not legally binding upon him.

They returned to South Africa and in 1935 again came to England. The plaintiff made certain inquiries and obtained a copy of a marriage certificate showing that the defendant had married Ada Burgess, at St. Peter's Church, Halliwell, in the County of Lancaster, on April 28, 1900.

The writ in the action was issued on Sept. 25, 1935.

F. J. Tucker, K.C., and *Constantine Gallop*, for the plaintiff: The cause of action—failure to marry lawfully—arose in 1922, and *prima facie* the action would be barred by the Statute of Limitations. A plaintiff is not, however, deprived of his or her remedy if the defendant has by fraud concealed the fact that a cause of action existed. The fact that the plaintiff went through a ceremony of marriage is merely incidental and not essential to her cause of action. She is not suing the defendant for going through a form of marriage with her, and the case is not one in which the plaintiff cannot succeed until the defendant has been prosecuted. The defendant had not seen his wife for 20 years, and that may be a good reason for not taking criminal proceedings.

[He referred to *Smith* v. *Selwyn* (1), *Lynn* v. *Bamber* (2), *Spiers* v. *Hunt* (3).]

Sir Patrick Hastings, K.C., and *Cyril Conner*, for the defendant: The two parties thought they were married. To all intents and purposes they were, and it is now said that the defendant has failed to keep his promise of marriage. In 1922, the defendant believed he was free to marry the plaintiff. It is not suggested that the defendant's real wife communicated with him. After 22 years, he thought he was free to marry again. The defendant was not fraudulent.

Lord Hewart, L.C.J.: The plaintiff alleges that the defendant promised to marry her and failed to fulfil his promise. She says that he deceived her and that various consequences have flown from that deceit. It is important to consider in this case whether the defendant did deceive the plaintiff, not only because of what has happened since 1922, but also because in view of the lapse of time, the plaintiff would have no claim for breach of promise of marriage unless her means of knowing the true facts had been concealed by the conduct of the defendant himself. It is important to consider whether the defendant fraudulently concealed from the plaintiff the fact that he was married. It is also important to consider at what date the plaintiff became aware that the defendant was married.

[His Lordship considered the evidence, pointing out that the plaintiff's evidence was practically unchallenged, and the jury were, therefore, en-

titled to accept her story. His Lordship then dealt with the question of damages.]

Verdict for the plaintiff and £8,000 damages. Judgment entered accordingly.

Solicitors: *Strong & Co.* (for the plaintiff); *W. H. Speed & Co.* (for the defendant).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

UPJOHN *v.* SIMMONS.

[CHANCERY DIVISION (Bennett, J.), **March 17, 18, 1936.**]

Practice—Summary judgment for specific performance—Issue to be tried—Interest on purchase money—R.S.C. Ord. 14A.

The plaintiff, as the vendor of freehold property, sought to charge the defendant, the purchaser, with interest on the purchase money. This the defendant refused to pay, alleging that the plaintiff had been guilty of wilful default. In an action for specific performance of the contract, the plaintiff sought to avail himself of the summary procedure under R.S.C. Ord. 14A.:—

HELD: this was not a proper case for the summary jurisdiction, as there was an issue to be tried and the parties must proceed to trial.

[**EDITORIAL NOTE.** R.S.C. Ord. 14A, provides a summary procedure for actions for specific performance which, however, is only available when the defendant does not by affidavit or *viva voce* evidence or otherwise satisfy the judge that he has a good defence to the action on the merits or disclose such facts as may be deemed sufficient to entitle him to defend. In the present case the judge held that the question of whether interest was payable on the purchase money, or whether such payment was negatived by the wilful default of the plaintiff was sufficient for leave to defend the action.

AS TO R.S.C. ORD. 14A, see the YEARLY SUPREME COURT PRACTICE 1936, pp. 183, 184; HALSBURY, Supp. to Vol. 27, para. 137.]

APPLICATION for summary judgment under R.S.C. Ord. 14A. The nature of the application and the facts are fully stated in the judgment.

Gerald Upjohn for the plaintiff.

Robert Fortune for the defendant.

BENNETT, J.: This is an application made under R.S.C. Ord. 14A for specific performance of a contract by which the plaintiff agreed to sell and the defendant agreed to buy certain freehold property for £890. The contract was made on Sept. 13, 1935, and £100 was paid by way of deposit. Completion was fixed for Oct. 14, 1935, and the contract provided that the purchaser must pay the residue of the purchase money on that day, together with certain payments in connection with fire insurance. Incorporated in the contract were the Statutory Conditions of Sale, cl. 4 of which states that where from any cause the completion of the sale is delayed beyond the fixed date, the purchase money, or

if a deposit has been paid, the balance of it, shall bear interest, if no rate fixed by the contract, at £5 per cent. per annum, from the date fixed for completion to the day of actual payment. If the delay arises from any other cause than the purchaser's own act or default, the purchaser may at his own risk deposit the purchase money, or the balance thereof, at any bank in England or Wales, and give notice in writing forthwith to the vendor or his solicitors. And the vendor must accept this in lieu of the interest accruing after the date of the deposit which would otherwise be payable to him under this condition. And it provides that no interest shall be payable by the purchaser if delay in completion is contributable to any other wilful act or default of the vendor.

The contract having been entered into, it is apparent from the bundle of correspondence (which mounts to something like ninety-six pages) that for some reason which does not emerge, the vendor's solicitors and the purchaser's solicitors were not on a very friendly footing. They even seem to have forgotten what was the main point of discussion and indulged in a somewhat abusive correspondence. [His Lordship read some of the letters.] This, of course, helped to delay the completion.

There was a dispute which interfered with the settlement of the form of conveyance. Finally, they did agree a form, and by Nov., 1935, the parties were ready to complete. The plaintiff thereupon sent a completion statement calculating interest from Oct. 14, which came to the sum of £4 9*s*. 5*d*. The defendant's solicitors refused to pay this amount, and this action was begun for specific performance. In the meanwhile the defendant had been let into possession. The defendant contests the right of the plaintiff to charge interest, alleging that he was no longer entitled to this right on the grounds that he had been guilty of wilful default. I do not think it is possible to decide that point whether that is so or not, but there clearly is an issue to be tried. The defendant's instructions are to get the full rigour of the law and not to determine that question now. He is entitled to go on for trial and spend one or two hundred pounds over his liability to pay £4 9*s*. 5*d*.

The question now is, are the plaintiffs entitled to the summary jurisdiction provided for by Ord. 14A when there is an issue to be tried? I think not.

Mr. Fortune has submitted that he is entitled to have costs on the grounds that they made it abundantly clear before this application that there was a defence, and the correspondence never indicated why they refused to pay or on what grounds the suggestion was based that the plaintiff had been guilty of wilful default in merely disagreeing the form of conveyance as to the inclusion of a covenant in the conveyance following the form of the covenant in the contract. I think the costs should be costs in the cause.

I shall treat this as a summons for directions. There will be a direction

to deliver a statement of claim. Defence within seven days—and as the bundles are agreed, there is no need for discovery.

Solicitors : *Theodore Goddard* (for the plaintiff) ; *J. R. Welch, Son & Algar*, agents for *Turner, Martin & Symes*, Ipswich (for the defendant).

[*Reported by* CHARLES E. EDEN, ESQ., *Barrister-at-Law.*]

OSCAR FABER *v.* COMMISSIONERS OF INLAND REVENUE.

[KING'S BENCH DIVISION (Lawrence, J.), **March 16, 17, 1936.**]

Revenue—Stamp—Sale of Annuity—Allotment of Shares—Valuation of Shares—Stamp Act, 1891 (*c.* 39), *ss.* 14(4), 60.

By a deed of covenant executed in Canada the appellant, in consideration of the allotment to him of certain shares in a Canadian company, agreed to pay to the company for such period as he should continue to carry on his profession an annual sum " equal to nine-tenths of the total income derived from " his profession which was carried on in England. The Commissioners decided that *ad valorem* duty was chargeable on the deed and they valued the consideration at four times one year's gross income derived from the appellant's profession :—

HELD : (i) the deed of covenant related to a matter or thing done or to be done in the United Kingdom within the Stamp Act, 1891, s. 14 (4).

(ii) the allotment of shares was good consideration for the sale of an annuity.

(iii) the deed of covenant was properly chargeable with *ad volorem* duty under the Stamp Act, 1891, s. 60.

(iv) in the circumstances of the case the valuation of the shares was a proper one.

[**EDITORIAL NOTE.** As to whether this document was exempt as not relating to anything to be done within the United Kingdom, it follows very much the same lines as *Inland Revenue Comrs.* v. *Maple & Co. (Paris), Ltd.*, [1908] A.C.22 ; 39 Digest 281, *651.* The valuation of the shares is, however, a point of much practical value, and, while no doubt the circumstances of any valuation of shares not having a definite marketable value are peculiar to themselves, the present case forms a guide to practitioners and shows a method of valuation that has been approved.

AS TO STAMPS ON ANNUITIES, see HALSBURY, 1st Edn., Vol. 24, Rentcharges, p. 479, para. 933, and FOR THE CASES, see DIGEST, Vol. 39, p. 284, Nos. 663-666.]

Cases refered to :

(1) *Inland Revenue Commissioners* v. *Maple and Co. (Paris), Ltd.*, [1908] A.C. 22 ; 39 Digest 281, *651.*

(2) *Glenboig Union Fireclay Co., Ltd.* v. *Inland Revenue Commissioners* (1922), 12 Tax Cas. 427.

(3) *Blandy* v. *Herbert* (1829), 9 B. & C. 396 ; 39 Digest 284, *663*

(4) *Re Wragg, Ltd.*, [1897] 1 Ch. 796 ; 9 Digest 310, *1928.*

(5) *Speyer Bros.* v. *Inland Revenue Commissioners*, [1908] A.C. 92 ; 39 Digest 255, *390.*

APPEAL from the decision of the Commissioners of Inland Revenue

that the sale of an annuity is deemed to be a conveyance upon which stamp duty is payable under the Stamp Act, 1891, s. 60.

R. W. Needham, K.C., and *Andrewes-Uthwatt* for the appellant: The deed of covenant is not liable to duty because it was executed out of the United Kingdom: Stamp Act, 1891, s. 14 (4). Alternatively, if it is liable to duty, it is not liable to *ad valorem* duty, but to a "deed" stamp only on the basis of this transaction being regarded as a sale of shares. Alternatively, if it is liable to *ad valorem* duty, then the amount or value of the consideration for the sale was a nominal sum not exceeding £50. In order to come within the Stamp Act, 1891, s. 60, it must be shown that (i) it is the sale of an annuity; (ii) it is property of a certain type relating to any matter done or to be done in the United Kingdom under the Stamp Act, 1891, s. 14 (4).

The Solicitor-General (*Sir Donald Somervell, K.C.*) and *J. H. Stamp*, for the respondents: Although the deed of covenant was executed out of the United Kingdom it is still subject to Stamp Duty under the Stamp Act, 1891 (*Inland Revenue Commissioners* v. *Maple & Co. (Paris), Ltd.* (1); Stamp Act, 1891, s. 14 (4)). The essence of an annuity is that it is a personal covenant binding on the grantor. The measure of the first payment to be made under this instrument is something done in this country. The Act says that it is sufficient if the instrument relates to anything done or to be done in the United Kingdom. This instrument places upon a person resident in this country an obligation to pay an annuity. It is not suggested that the appellant has any intention of leaving the United Kingdom, and the instrument itself raises the inference that the appellant shall continue his activities in the United Kingdom. It is contended that this transaction might be regarded as a sale of shares. This contention has come forty-five years too late, for the Stamp Act, 1891, s. 55, provided that where the consideration for a transaction was stocks and securities it was to be treated as a sale. Prior to the introduction of this section, unless there was a money consideration, there was no sale. This transaction cannot be looked at in two ways, either (i) as a sale of an annuity or (ii) as a sale of shares, so that the tax may be assessed on the basis most favourable to the taxpayer (*Speyer Bros.* v. *Inland Revenue Commissioners* (5)).

Lawrence, J.: In this case the question I have to decide is whether the decision of the Commissioners was right, and whether the *ad valorem* duty assessed by value on the deed of covenant of Mar. 31, 1933, was correct. That question depends upon the construction of the Stamp Act, 1891, ss. 14 (4), 55 and 60. By the deed of Mar. 31, 1933, the appellant covenanted with the company, which he was forming:

> to pay to the company for such period as he should continue to carry on the profession of civil and constructional engineer and consultant an annuity or annual sum to become due and payable on Mar. 31 every year equal to nine-tenths of the total

income derived from the carrying on of the profession of civil and constructional engineer and consultant in that year by the appellant, the first of such payments to fall due on the date of that covenant, namely, Mar. 31, 1933.

He entered into that covenant in return for issuing an allotment to him

or his nominees of 10,000 Common "B" shares of a par value of 5 dollars each in the capital stock of the company and 250,000 dollars of the 20-year non-interest-bearing redeemable gold debentures of the company had determined to grant to the company.

This instrument has been held by the Commissioners to be liable to *ad valorem* duty as being a conveyance on sale, having regard to the Stamp Act, 1891, s. 60, which provides:

> Where upon the sale of any annuity or other right not before in existence such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments, if there be more than one, is to be charged with the same duty as an actual grant or conveyance, and is for the purposes of this Act to be deemed an instrument of conveyance on sale.

The appellant admits that there was an annuity created by this instrument or other right not in existence, but it is contended on his behalf that it ought not to be held to be a conveyance on sale, in the first place having regard to the Stamp Act, 1891, s. 14 (4), which provides that "an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom" should not be given in evidence unless it is duly stamped.

It is contended for the appellant that this was not an instrument relating to any matter or thing done or to be done in any part of the United Kingdom, and it was argued in particular that in the first place the instrument was executed in Canada, that the company was a Canadian company and that the payment must be in Canada, and that there is nothing to be done under the instrument in England at all, that the instrument does not create an assignment of the income. It operates merely by way of a covenant, and it does not necessarily contemplate or impose upon the appellant the necessity of carrying on his business in England. He might carry it on elsewhere, and it is said that the business carried on in England by the appellant is merely used for the purpose of quantification, and as a measure of some of the covenants to pay to the company. It is pointed out that the covenants not to pay out of the income but to pay a sum equal to nine-tenths of the total income derived from the carrying on of this business. This is the argument on behalf of the appellant on this point.

On the other hand, the Solicitor-General contends that the instrument does relate to a matter or thing done or to be done in any part of the United

Kingdom, that the business which the appellant was carrying on at the time of Mar. 31, 1933, was a business in the United Kingdom. The instrument further provides that it should be construed according to English law and it provides that it should be subject to English income tax, and he refers me to the case of the *Inland Revenue Commissioners* v. *Maple & Co. (Paris), Ltd.* (1). At page 26, referring to the same words, Lord Macnaghten said that the words "relating to" were the widest possible words. He said: "There is no expression more general or far-reaching than that"; that is to say the expression "relating to." He referred also to the case of the *Glenboig Union Fireclay Co.* (2), which has been cited by Mr. Needham. Lord Buckmaster, at page 464, was considering whether compensation which had been assessed for the compulsory taking of fireclay belonging to the company should be upon the basis of so many years' profit instead of being derived from the working of that fireclay; the question being whether the sum so assessed and received was assessable to excess profits duty. He said:

> But there is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test.

As the Solicitor-General pointed out, Lord Buckmaster did not say, and he could not have said, that there is no relation between the measure that is used for the purpose of calculating the particular result and equality of the figure that is arrived at by means of the application of that test. It is, of course, obvious that a figure arrived at by applying a certain measure must bear relation to the measure. It is no doubt true that the quality of the figure might not bear any relation to the measure. But here the question which I have to decide is whether this instrument relates to any matter or thing done or to be done in any part of the United Kingdom when it provides for a sum equal to nine-tenths of the income of the business which was carried on in England up to Mar. 31, 1933, and contemplates that it will continue or may continue to be carried on in the United Kingdom—whether that instrument does not relate to a matter or thing done or to be done in the United Kingdom. In my judgment it does relate within the meaning of the Stamp Act, 1891, s. 14 (4), to a matter or thing done to to be done in the United Kingdom. I am therefore of opinion that this argument of the appellant's is unsustainable.

His second argument is that this was not a sale of an annuity within the meaning of sect. 60, because, as I understood the argument, he said that it was not a sale for pecuniary consideration but was a sale transaction whereby the appellant parted with the annuity and covenanted to pay the annuity in consideration of the payment of stocks and shares or stocks and debentures. He said the dual character of the transaction made it impossible to say that there had been a sale of an annuity. I

ought to say that Mr. Needham relied upon certain early authorities with reference to what was a sale of an annuity and particularly to the case of *Blandy* v. *Herbert* (3). The Solicitor-General pointed out to me that since those authorities had been decided sect. 55 of the Stamp Act, 1891 has been passed, which expressly provides that.

> where the consideration, or any part of the consideration, for a conveyance on sale consists of any stock or marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the value of the stock or security.

So that it is clear that now at any rate there can be a conveyance on sale within the meaning of the Stamp Act, where the consideration is not in money but in stocks or shares or securities. If that is so, then it would seem that the sale of an annuity can be made in consideration of stocks and shares or securities, and that seems to me to dispose of the embarrassing character of this transaction. What the appellant parted with for the consideration in moving from the appellant to the company was a covenant to pay the annuity, what is admittedly an annuity, and in return for that he got nothing but shares and securities ; and on the construction of the Act, having regard to sect. 55, I have come to the conclusion that there was in this case the sale of an annuity and that that ground of attack upon the decision of the Commissioners therefore fails.

The third contention of the appellant is that, assuming that this instrument is to be stamped as a conveyance on sale, the Commissioners were wrong in the valuation which they made of the shares and debentures which were the consideration. I assume for the purposes of my judgment that these shares and debentures were marketable securities within the meaning of the Stamp Act. The Solicitor-General did not contest this, though he drew my attention to some sections which throw some possible doubt upon it. I will assume that they were marketable securities.

It is contended by the appellant that the method of valuation which has been adopted is obviously wrong, because he says in the first place the Commissioners have adopted the figure of £18,717 which they have multiplied by four, taking four years' purchase of one year's gross income, and he says it is clear that the covenant never applied to net income, and therefore to multiply the gross income by four was obviously wrong. He says that the reason given by the Commissioners in the alternative ground of their valuation, namely, that if the securities, stocks and shares were not marketable, the nominal value of the securities and shares ought to be taken, is equally wrong because of the nature of the transaction, which was a domestic transaction, by which Mr. Faber constituted his business in a sort of way into a company ; therefore it ought to be assumed that the nominal value put upon these securities or shares is not the true value, or is not necessarily the true value. The case of *Re Wragg* (4) was cited to me by the Solicitor-General, laying

down that so long as the transaction on which the company enters with reference to shares is unimpeached, the nominal value of the shares ought to be taken as their true value. I see no ground for interfering with the Commissioners' valuation in this case.

The age of Mr. Faber is not stated in the case, but it has been agreed between counsel appearing that his age was 50 or thereabouts; and having regard to that, and having regard to the possibilities of the case, I am unable to say that the Commissioners have come to a wrong conclusion as to the value.

Mr. Needham contended that there was what he called a welter of uncertainties as to the value of these debentures and shares, and he said that the true test of that value was what anybody would be likely to give for them, and it would be very unlikely that anybody would give anything substantial for them, having regard to the possibility of Mr. Faber, after it was sold, derogating from his own sale or by seeking to carry on business as a consulting engineer, or possibly dying or failing in his business. I am of opinion that I ought to disregared the possibility of Mr. Faber derogating from his own grant, and that having regard to the possibility which can be properly taken into account of his death or ill-health or failure of business, I see no reason to interfere with the conclusion at which the Commissioners have come. As to the figure being the gross figure, I think that may be accounted for by the number of of years purchase which is applied.

I therefore answer the question that is put to me in the affirmative, and the appeal will therefore be dismissed.

Solicitors: *Mills, Lockyer, Church & Evill* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

A/S RENDAL *v.* ARCOS, LIMITED.

[COURT OF APPEAL (Slesser, Greene and Scott, L.JJ.], **March 19, 20, 1936.**]

Shipping—Charterparty—Ice clause—Notice of claim for damage—Reservation of right to claim for damage—Judicial cognizance of constitution of a foreign state.

A steamship was chartered by Arcos, Ltd., of London, "for Exportles, Moscow," under a "Baltwood" charterparty containing a clause which bound the charterers to provide ice-breaker assistance, and a condition that notice of claims must be given within a year. The steamer was damaged through breach of the ice clause by the charterers. A claim for demurrage was dealt with by the Russian Trade Delegation in Oslo as agents for Exportles, Moscow. The owners also stated that they reserved their right to claim for compensation for ice damage, but actually made no claim within the year :—

HELD : (i) reservation of the right to claim is not notice of a claim.

(ii) in the absence of evidence, and the acting in the claim for demurrage was not such evidence, it could not be inferred that the Russian Trade Delegation in Moscow were agents of Exportles, Moscow, for the purpose of receiving notice of a claim for ice damage, as opposed to demurrage.

(iii) an English court cannot take judicial cognizance of the internal constitution and economy of a foreign state. These matters must be proved by evidence.

[**EDITORIAL NOTE.** There is a very definite limit to the matters of which the court will take judicial notice. On one occasion the court required proof of the fact that France and Austria were at war with one another. It seems clear and well settled that apart from the extent of the territory and the titles and the status of the sovereign, the court will not take judicial note of any of further matter in relation to foreign countries. Upon the other point the case is probably of most interest to people interested in Baltic trade, but the point that the reservation of a right to claim is not notice of a claim is of some general application and should be noted.

FOR THE LAW AS TO JUDICIAL NOTICE, see HALSBURY, Hailsham Edn., Vol. 13, pp. 619, 620, para. 691, and FOR THE CASES, see DIGEST, Vol. 22, pp. 148-150, Nos. 1262-1274. AS TO THE ICE CLAUSE, see HALSBURY, 1st Edn., Vol. 26, Shipping, p. 132, para. 216, and FOR CASES, see DIGEST, Vol. 41, pp. 435, 436, Nos. 2733-2737.]

Cases referred to :

(1) *Akties. Steam* v. *Arcos, Ltd.* (1933), 39 Com. Cas. 158 ; Digest Supp.

(2) *Seaberg* v. *Russian Wood Agency, Ltd.* (1934), 50 Lloyd L.R. 146.

(3) *Dampskibs. Akties. Laly* v. *Arcos, Ltd. and Exportles* (1934), 48 Lloyd L.R. 117.

(4) *The "Heilo"* (1927), 27 Lloyd L.R. 15.

APPEAL from a decision of GODDARD, J., given on June 28, 1935, holding that in the circumstances hereinafter set out, there had been sufficient notice of the claim to satisfy the charterparty hereinafter referred to.

I. H. Stranger, K.C., and *Harry Atkins*, for the appellants: The respondents say that if one agent contracts so as to make himself personally responsible, he is bound by notice to another agent of which he himself has no notice. This proposition cannot be upheld. No notice was given to the appellants at all until 1935. In any case, notice of the reservation of right is not notice of a claim. [Counsel referred to *Seaberg* v. *Russian Wood Agency, Ltd.* (2).] The position of Exportles is dealt with in *Dampskibs. Akties. Laly* v. *Arcos, Ltd. and Exportles* (3). Notice to one agent of the Russian Government is not notice to Arcos.

C. T. Le Quesne, K.C., Cyril Miller and *Richard Hurst*, for the respondents: Notice was given to the mercantile agent of the appellants, who was Exportles. [Counsel referred to *The "Heilo"* (4).] The learned judge found it a fact that Exportles was the agent of the Russian Government. A form of notice is to be regarded from a business and not a juristic point of view: *The "Heilo"* (4). Here there was a plain intimation that a claim was going to be made for the damage to the hull, and the only reason why it was not being put forward in full detail was that the shipowner had not yet had time to ascertain what the damage was.

Slesser, L.J.: This is not an easy case, and it is one of those cases where great care has to be taken that the principle of construing documents and facts commercially is not pushed to such an extreme point that a situation is produced which is not justified on the evidence.

The parties to this case are A/S Rendal, who are the owners of the steamship "Rendal," and Arcos, Ltd., the defendants. By a Chamber of Shipping "Baltwood" charterparty dated Dec. 3, 1930, made between Mr. Moltzau, the managing owner of the ship "Rendal," and Messrs. Arcos, Ltd., of London, for Exportles, Moscow, it was agreed that the vessel should take cargo for the owners' benefit to any port or ports in the Baltic Sea, and, after discharging same, sail and proceed to Leningrad and then take on board a full and complete cargo of pulpwood, and, being so loaded, proceed therewith to Sarpsborg, which is a port, we are told, near Oslo in Norway. There is in this charterparty, as often occurs in these charterparties, a provision with regard to ice-breaker assistance, and by clause 35 an obligation is put upon the charterers to supply the steamer with ice-breaker assistance to enable her to enter and leave the port of loading on conditions set out in that clause, and there are provisions that that ice-breaker assistance is to be rendered within forty-eight hours of the steamer's readiness to leave the port of loading, and that "any time lost in waiting for ice-breaker assistance beyond forty-eight hours after readiness to proceed to be for charterers' account," and so on.

The allegation in the points of claim is that the defendants, Arcos, Ltd., failed to perform their duties under clause 35 of the charterparty.

It is said that in pursuance of the charterparty the steamship duly proceeded to Leningrad and there loaded a cargo of pulpwood and in the forenoon of Jan. 7, 1931, was ready to proceed therewith on the voyage to Sarpsborg, but was unable to do so without ice-breaker assistance, by reason of ice; that under the charterparty the defendants contracted to supply, or it was their duty to supply, within forty-eight hours of the steamship being ready to leave the port of Leningrad, continuous ice-breaker assistance, and that in breach of that contract or duty the defendants failed to supply to the steamship such ice-breaker assistance but supplied intermittent ice-breaker assistance only, and that the vessel was frequently and for long periods left in the ice without any ice-breaker assistance at all. Then follow particulars of the times when the vessel was either given intermittent ice-breaker assistance only, or was left without any ice-breaker assistance at all. As a result of these facts it is said that the steamer was constantly subjected to severe pressure and strain from the ice and that she received damages to her hull, internal structure and machinery, and that the injury which she suffered consisted altogether of—reduced to English money—£3,461 15*s.* 6*d.*, being the sum of £2,471 15*s.* 6*d.* for repairs and extra expenses of surveys, and the sum of £990 for detention during repairs.

With regard to this claim, a point was taken by way of objection by the defendants to the matter being considered at all: namely, that under clause 24 of the charterparty (which I will read) the plaintiffs in the circumstances of this case were precluded from proceeding with their claim. Clause 24 of the charterparty is as follows:

> Notice of any claim under this charter or under any bill of lading given hereunder must be given within twelve months of the date of the vessel's arrival at final port of discharge, otherwise all claims shall be deemed to be waived.

Now the vessel arrived at its final port of discharge in Feb., 1931, and the defendants, Arcos, Ltd., say that it was not until the year 1935 that an effective claim was made under this charterparty with regard to these damages, and that therefore the plaintiffs are out of time and ought to fail on that ground alone, if upon no other ground.

Now the facts of the case, so far as they are material to this dispute, are as follows. The correspondence shows that there is at Oslo an association—it may be a corporation, but I do not know—which is called in our translation the Russian Trade Delegation in Norway; that body was interested to this extent, that on Feb. 27, 1931, there was sent to Exportles by the Nordisk Company, agents for A/S Rendal, the plaintiffs, this telegram: "Rendal Sarpsborg bills of lading not presented steamer lying charterers' account." That telegram was answered on the next day by Exportles, who sent to the agents of the plaintiffs a telegram reading as follows: "Have duly presented bills of

lading to buyers through Christiania Bank please apply trade representative Oslo." That trade representative at Oslo, for the purpose of dealing with any possible question of these bills of lading or of lien arising for demurrage, or with any question apparently concerning the cargo as such, was this Russian Trade Delegation. So far there is really no dispute. Questions of demurrage arose, however, as the result of the delay through the ice, and claims were made, as appears from the correspondence. On Feb. 27 the Nordisk Company, acting for the plaintiffs, write to the Russian Trade Delegation at Oslo thus:

> We beg to refer to our letter of to-day regarding s.s. "Oddvar." S.s. "Rendal," which is in the same position, claims according to the ice clause a total of £1,532 by way of compensation for 39 days 1½ hours' loss of time at £30 and extra coal consumption 200 tons and £100 for extra call at Reval. We hope you will be able to arrange a deposit for the owners' claim in the same way as suggested in the case of s.s. "Oddvar."

That matter which is there dealt with is clearly a matter arising out of the delay and concerning the detention and demurrage only.

Then there is an answer to that letter of Feb. 27, 1931, on the next day, from the Trade Delegation to the plaintiffs' agents in these words:

> In reply to your letter of Feb. 27 regarding this ship, we beg to inform you that, without prejudice as to the reason for and amount of the claim, we have deposited £1,532 with the Christiania Bank and Kreditkasse. We agree to deposit the money in joint names and declare at the same time that we are responsible for your claim to Exportles according to charterparty dated Dec. 3, 1930, but not exceeding the deposited amount.

Here again it is quite clear to my mind from this answer, as well as from the letter which was addressed to them, that they were dealing, and dealing only, with the question of damages arising out of the detention. Then the correspondence goes on, and on Feb. 28, 1931, there was a letter written by Nordisk to the plaintiffs' agents in these terms:

> We confirm telephone conversation, and thank you for your assistance to arrange the matter by depositing £1,532 with the Christiania Bank and Kreditkasse as a security for owners' claim. The amount will thus be deposited in joint names of yourselves and owners, and we are awaiting your declaration that you may be sued here in Norway for owners' claim upon Exportles under the charter dated Dec. 3, 1930. For the sake of order we beg to point out that owners reserve their right as regards alterations of their claim, as they first want to confer with the captain in order to make themselves thoroughly acquainted with the matter.

Again I observe that the claim there is the original claim mentioned: namely, the claim for the detention of the ship. Then on Mar. 2 there is an agreement by the Russian Trade Delegation to deposit the money in joint names, and that letter says:

> We are responsible for your claim to Exportles according to charterparty dated Dec. 3, 1930, but not exceeding the deposited amount.

So far there is really no suggestion of any notice of any claim made by the plaintiffs to satisfy clause 24 of this charterparty with regard to damages to the hull, but the next letter, which is dated Mar. 19, 1931, and which is signed by the plaintiffs' agents and addressed to the Trade Delegation in Norway, is relied upon and, indeed, pleaded as the notice, and that letter, therefore, requires careful consideration. I do not think it is necessary to read all of it, but having acknowledged the receipt of the letter of Mar. 2, which was the letter from the Trade Representative dealing with the deposit on a claim for detention, and detention only, in these words :

> We have duly received your letter of the 2nd instant, informing us that you have accepted liability for the claim which the owner may eventually have in respect of this ship on Exportles in accordance with the charterparty of Dec. 3, 1930, within the limits of the deposited amount of £1,532.

they also send in a claim for extra coal consumption as well as the bill for loss of time and the extract from the log. They then enter into details with regard to that matter, and conclude thus :

> For this breach of the contract the charterers are obliged to pay full compensation, and the owner's claim therefore amounts to more than demurrage at £30 a day for the loss of time. The owner, in the first place, claims compensation for the considerable expenses he has had for extra bunkers during the stay in the ice. This amounts to £253 18*s.* 6*d.* altogether.

and they also say :

> Because of the long hold-up in the ice, it was also necessary for the ship to go into Reval to replenish her supply of bunkers.

and they claim £60 there, making a total claim of £1,532 12*s.* Now it is perfectly clear from that language, as indeed must appear from the letters before, that the claim was for demurrage and for extra bunkers caused by the delay.

Then follows a passage in the letter which is relied upon by the plaintiffs as being a notice of an intention to claim in respect of the matters in this action—that is to say, for damage—and it reads thus : "For the sake of good order" (that has been variously translated, but the effect of it seems to be, "for protection," or, "for the sake of clarity") :

> please note that the owner reserves his right to claim for compensation for damage to the ship which occurred on account of her being left in the ice by the ice-breaker. The owner has not yet had the ship docked and cannot, therefore, say how much damage has been caused to the ship in this way, and as you are only liable, according to the charterparty, within the limits of the deposited amount, this question only concerns you in case the above-mentioned claims, for one reason or another, are reduced.

In my opinion, it is not possible on that language to say that there has been given with regard to the damage a notice of a claim under the

charterparty. What is said is that the owner reserves his right to claim for compensation for damage to ship, and for there to be a notice of a claim there must be a notice of something which would amount to a claim if the matter were pursued. Now a claim, it has been said, is a challenge in regard to something withheld wrongfully. I think it is right to say that a claim is something in the nature of a challenge or demand. To say that you reserve a claim seems to me to be, I will not say the contrary, but strongly differentiated from making a claim. It is at most an intimation that nothing which has been said up to that time will prejudice your right hereafter to make a claim if you are so minded. But it is not, in my opinion, possible to say that a notification that the owner reserves his right to claim—the letter does not even say "reserves his claim," but "reserves his right to claim"—can amount to a claim itself.

As regards the latter matter upon which Mr. Le Quesne relies: that according to the charterparty this question—that is, the question of how much damage has been caused—only concerns the recipients "in case the above-mentioned claims for one reason or another are reduced," Mr. Le Quesne suggests that this is an admission that, if there is a claim in respect of the detention of the ship for less than £1,532, a claim may be made for damage as regards the balance, and that indicates that a claim is being made. I cannot so construe those words. I think they are no more than the earlier part: a preservation of such rights to make claims as the plaintiffs might have; and that they cannot be said to be a claim, nor a notice of a claim. It is at the highest a notice of the preservation of a right to claim. Now there is, in my opinion, no other letter and no other fact on which one is entitled to assume or to draw an inference that a claim is made before the letter of Jan., 1935—which, of course, is after the time contemplated by clause 24 of the charterparty. Having come to this conclusion, that finding, in my judgment, settles this case in favour of the appellants here, because if there was no notice of claim at all, it does not become material to consider whether the notice of claim was given to the proper persons as contemplated in the charterparty. But I will assume for the moment—since the second question, namely, whether a notice of a claim had been given to the persons competent to receive it, formed the basis of the learned Judge's judgment below and has been argued here fully—that I am wrong on my first view with regard to the claim itself, and I will assume in favour of Mr. Le Quesne that the notice of Mar. 19, 1931, might have constituted a notice of claim if it had been given to the right person. The question then arises whether such notice was in fact given to the right person. Notice to a stranger obviously would not satisfy the conditions of clause 24 of the charterparty. The alleged notice is given clearly by the plaintiffs' agents. No question arises as to the persons who

give the notification, but it is given to the trade representatives of the U.S.S.R. In my opinion, though the matter is not a very easy one to decide in the absence of evidence, the respondents here have failed to show that the trade representatives of the U.S.S.R.—what is sometimes called the Trade Delegation—were, for the purpose of clause 24 of this charterparty, the agents of Arcos, Ltd., or of Exportles, to receive this notice. I think Mr. Le Quesne is right when he says that, where a notice is given to Exportles and not to Arcos, Ltd., either directly or through their agents, that would be sufficient to satisfy clause 24. Clause 24 does not name the person to whom the notice has to be given; it simply says "Notice of any claim under this charter." In so far as it is stated that Arcos, Ltd., were acting for Exportles, I think a notice to Exportles, either directly or mediately through an agent competent and authorised to receive it, would be sufficient. But in my view, as I have said, it is not possible here to show, on the material which was before the learned judge, that the Trade Delegation, to whom the alleged notice was given, was authorised by Exportles to receive it. The evidence seems, to my mind, only to go to this: that Exportles had constituted the Trade Delegation their agents to deal with the matters concerning the claim for detention of the ship, the demurrage, questions concerning the cargo, the lien, or anything dealing with the subject-matter of the arrival and disposal of the cargo at Sarpsborg. I cannot see in these letters that there is any further representation that the Trade Delegation were in any way competent to represent Exportles.

Now Mr. Le Quesne's argument, as I understood it, really amounted to this: that the Trade Delegation themselves had so behaved that they had held themselves out as the agents of Exportles for all purposes, and therefore as a matter of business must be deemed to be the agents of Exportles to receive a notice with regard to a claim for damage to the hull. But that does not seem to me to be the right way of putting the matter. There was clearly no express authority—at any rate, no express authority can be found—for the Trade Delegation to act for Exportles, and if there be an authority, it must be one implied. It is true that an agent who is authorised to do any act in the course of his business as an agent has implied authority to do what is usually incidental in the ordinary course of that business to the execution of his express authority, but if the express authority was limited to dealing with the cargo and matters arising out of the detention of the ship, and that only, as I think is the case, it cannot be said that this authority, in itself or by way of any incident of it, extended to dealing with matters arising out of the damage to the ship. It would be very dangerous to assume that, because a person whom some people alleged to be an agent did that for which there was no reason to suppose, directly or

indirectly, he was authorised, therefore someone else should be made responsible for his acts in the absence of any evidence to show that he was competent to act as an agent. I think, therefore, that it is not possible to say that this notice given to the trade representatives of the U.S.S.R. was a notice received by them as agents for Exportles.

There is only one other matter with which I think I ought to deal. The argument Mr. Le Quesne has addressed to us does not seem to me entirely to support the grounds on which the learned judge proceeded in this case. As I read the learned judge's judgment in this case, he has nowhere found that Exportles made the Trade Delegation their agents for the purpose of receiving a notice as to damage to the ship. All he says, after summing up the letters, is this :

> It is abundantly clear that the matter of the claim which the shipowners had for being detained in ice was made perfectly clear to Exportles.

There is no finding anywhere that I can see beyond that. The reason, as I understand it, for which the learned judge comes to the conclusion that here was a sufficient notice seems to me to be that he comes to the conclusion—relying upon certain matters which I shall have to mention—that in reality the Russian Government were the charterers. Speaking of Exportles, who appear on the charterparty to be the persons for whom Messrs. Arcos, Ltd., act, he describes them as "an agency of the Russian Government"; and speaking of the Russian Trade Delegation he says that it is "another branch, of course, of the Russian Government, another agency on behalf of the Russian Government." I think he takes the view that this notice given to the Trade Delegation was a notice given to the principal because the principal was the Russian Government and in that way the notice was properly given to them, Exportles merely being their agents.

I come to that conclusion because the learned judge in his judgment quotes a passage from GREER'S, L.J., judgment in the case of *Akties. Steam* v. *Arcos, Ltd.* (1), at page 172, to the effect that Exportles must necessarily have been the agent of the Soviet Government :

> The court is entitled to take judicial notice of the constitution of the U.S.S.R., just as it is entitled to take judicial notice of the constitution, say, of the United States of America. It is part of the constitution of the U.S.S.R. that no individual firm or company is permitted to engage in foreign trade. Foreign trade is the monopoly of the State. It follows that in shipping the goods and taking the bill of lading Exportles must necessarily have been the agent of the Soviet Government.

In so far as the judgment is based upon this matter, and in so far as the learned judge has quoted this passage as his authority, I would say that, in that particular case, there may have been evidence on which the learned judge came to the conclusion that Exportles must have been the agent of the Soviet Government. But if the wider proposition is relied upon, that the court is entitled to take judicial notice of the

constitution of the U.S.S.R. and of its economic, as well as its political constitution, then with great regret I cannot quite share that view. Nations

recognise each other's existence and general public and external relations. Every soverign, therefore, recognises, and, of course, the public tribunals and functionaries of every nation notice, the existence and titles of all the other sovereign powers in the civilised world.

It is also true that the court may take judicial notice of the boundaries in which those states exercise their sovereignty, or may, if in doubt, obtain information from the Foreign Office on that subject. But to go farther and to say without evidence that this court can take judicial notice of the internal constitution or the internal economy of a state, appears to me, with every respect, to be contrary to principle. Such matters must be proved as fact like all other matters of foreign law. I only mention this matter because the learned judge appears to rely upon for a finding that Exportles in this case was a part of the Russian Government, which, even had there been evidence to that effect and it were not merely a matter of judicial notice in the case of *Akties. Steam* v. *Arcos, Ltd.* (1), may not be the case to-day. There is here no evidence before us to make any assumptions, in my opinion, about the relations of Arcos, Ltd., or Exportles to the Russian Government. We have no evidence to come to any conclusion on that matter, and we are not entitled to take judicial notice of these matters. For myself, I should even have this further difficulty: that if I were to take judicial notice and did not have the necessary knowledge upon which that notice could be exercised, I should not know what the relations between these various parties are, and there is no evidence about it in this case. For these reasons I am of opinion that this appeal must be allowed.

GREENE, L.J.: I agree. Clause 24 of the charterparty says:

Notice of any claim under this charter or under any bill of lading given hereunder must be given within twelve months of the date of the vessel's arrival at final port of discharge, otherwise all claims shall be deemed to be waived.

When the clause says that notice must be given, it means, I think, that notice must be given in the case of a claim against the charterer to the charterer or to the charterer's duly authorised agent in that behalf. In the present case Arcos, Ltd., the defendants, are—and it is common ground—personally liable as parties to this charterparty. On the face of the document they declare themselves to be acting for Exportles, Moscow, and I will assume that a notice given to Exportles, or to the duly authorised agent of Exportles, would be a sufficient notice under clause 24, and that it would not be necessary to show notice to Arcos, Ltd., or to an agent of Arcos, Ltd. But, when it is alleged that notice

has been given under this clause, it is necessary to prove that the person to whom the notice was given, if he were not one of the parties to the contract, was duly authorised by the party concerned to receive the notice. When I say "duly authorised" I mean, of course, authorised in accordance with the ordinary principles of the law of agency. The authority may be express, or it may be general, provided it is sufficiently wide to cover the receipt of notice, or it may be an authority which is to be imputed under the doctrine of "holding out." But, short of proof of one of those three methods of establishing the authority of the alleged agent, it is not, in my opinion, justifiable to draw inferences as to its authority which are not based on a sure foundation in the evidence.

In the present case we have to deal with three bodies: first of all, Arcos, Ltd., a corporation established under the Companies Acts of this country; secondly, a body or a corporation, I know not which, called Exportles, which appears to have its place of business in Moscow; and thirdly, a body with a Norwegian name which is conveniently referred to as the Trade Delegation. What the relationship of those various bodies to one another may be is a matter to be ascertained from the evidence, assisted by any legitimate and sure inference to which the evidence points. I cannot myself accept the view that the court is entitled to draw any sort of inference as to the relationship of these bodies based on assumptions as to their position under the constitution of the U.S.S.R. The learned judge, I think, found himself able to draw the inferences upon which, expressly or tacitly, his judgment is based, from the circumstance that he found himself able to establish a nexus between those three bodies based upon this: that they were all three agents of, or branches of, the Russian Government. Speaking from some little experience of the constitution of the U.S.S.R., which has been frequently discussed and studied in relation to matters arising in this country, I must confess that I have viewed with some apprehension the suggestion that I am to take judicial notice of it; and, with the greatest possible respect, I am unable to take the view which Greer, L.J., appears to have expressed in the case relied upon by the learned judge in this case—namely, that the court can take judicial notice of that constitution. It appears to me, with the greatest deference, that the constitution of a foreign country is a question of the law of that foreign country, and the law of a foreign country in these courts is a question of fact which must be proved by proper evidence. If the plaintiffs in the present case were minded to ask the court to draw any inference based on the constitution of the U.S.S.R., it was for them to prove that constitution in the usual way.

It remains, therefore, to consider the question whether the party to whom the notice was in fact given, the Norwegian Trade Delegation,

was the duly authorised agent either of Arcos, Ltd., or of Exportles to receive a notice under clause 24 of the charterparty. There is no suggestion that Arcos, Ltd., authorised them; the case made is that they were authorised by Exportles. Now it is necessary, I think, to examine with a little care the precise evidence on which that allegation is founded. It is founded upon certain letters and cables which are to be found in the bundle of correspondence. On Feb. 27, 1931, there were two matters arising for discussion and solution. A company, or association, which is referred to as Nordisk, were acting as agents for the shipowners. The two matters which were arising for solution, or discussion, were these. First of all, on the arrival of the vessel the bills of lading had not been presented, with the result that the cargo was not unloaded and the steamer was lying there with a consequential claim against the charterers for that detention. That was the first matter. The second matter was this: that, in common with another vessel, the vessel in question in this case had been detained in the ice as it left the harbour of Leningrad. That claim was being put forward again by Nordisk. With regard to the first of those questions, a cable was sent by Nordisk to Exportles pointing out that the bills of lading had not been presented and that the steamer was lying for the charterers' account; and they received in reply on the following day, Feb. 28, 1931, a telegram from Exportles informing them that the bills of lading had been duly presented to the buyers through the Christiania Bank and instructing Nordisk to apply to the trade representative, Oslo. It is agreed by both counsel that the words "trade representative" appearing there are meant to be the name of the Trade Delegation in Norway, of which I have spoken.

I would observe, looking at those telegrams, that the latter document is the only document emanating from Exportles which is before the court, and it is one of the documents on which in the particulars given in their amended pleadings the plaintiffs rely as the authorisation by Exportles to the Trade Delegation. That document is dealing with a limited and special matter. It is dealing with the question of procuring the unloading of the vessel and the presentation of the bills of lading, and of the consequential avoidance by the charterers of a claim for detention owing to delay in taking delivery. It seems to me quite impossible to read that document either as an express authority or as a holding out—*i.e.*, a holding out of the Trade Delegation as having authority to deal with a totally different matter, namely, claims arising under the charterparty—or anything of the kind.

Now, turning to the second matter which was arising at the time, namely, the claim in respect of detention in the ice, the correspondence shows quite clearly that the Trade Delegation in Norway was taking upon itself the obligation to put up a sufficient sum of money to enable the shipowners' lien in respect of that detention in the ice to be cleared

so that the cargo could be freed. Whether or not they were taking upon themselves that liability pursuant to some special or general authority given to them by Exportles, I do not know. It is said that it may fairly be assumed that they were doing it under some such authority. I am content to make that assumption, although I wish to say this: that I do not treat the assumption as being a justifiable one. I, for one, would rather protest against the suggestion that the action of persons who, it is alleged, are agents of a third person can be safely relied upon to prove the agency. There may very well be reason in commercial life why a person having no authority in that behalf may find it desirable to undertake an obligation in the hopes that his business correspondent, or whoever it is he may be in the habit of dealing with, may ratify what he has done. There may be very sound business reasons why obligations of that kind should be undertaken, and to infer, from the fact that such an obligation was undertaken, that there was authority to undertake it, appears to me, with all respect, to be a very dangerous doctrine. I do not, however, think for present purposes that it is very material, because, as I say, I am prepared to make the assumption that the Trade Delegation had authority to accept liability to be sued in the courts of Norway in respect of a claim for detention in the ice up to the amount which they deposited, namely, £1,532. Again, it appears to me quite impossible and unjustifiable to take from that the further step that they were authorised to accept notice of a totally different claim: namely, a claim in respect of ice damage. Be it observed that it was only by putting up the necessary deposit that the cargo could be freed, and it is not the least bit unlikely that they would have authority to do whatever was necessary to free the cargo. But to say they had authority to do anything in connection with a different claim is, I think, straining to an unjustifiable extent the power of the court to draw inferences, and I for one decline to draw the inference from the documents and facts in this case that there was any such authority.

Now Mr. Le Quesne relies upon one further point in that connection, and that is this: that after the Trade Delegation had accepted responsibility in respect of the claim for detention in the ice, the owners' agents, Nordisk, in a letter of Mar. 19, 1931, indicated that any claim they might make in respect of ice damage would be made or might be made up to the limit of the deposited amount against the Trade Delegation. He points out that in answering that letter the Trade Delegation does not say: "We are not the proper persons to whom such notice should be given," but, instead of that, they repudiate any claim for ice damage as being unjustifiable, and purport to repudiate it on behalf of the charterers. I think that is much too flimsy a ground upon which any inference could be based as to the authority of the Trade Delegation to accept the notice. Be it observed that it is a statement by the alleged

agent. Here again it seems to me that, without going so far as to say that in some cases the conduct of agents may not be properly looked at in order to see exactly what the scope of their authority may have been, if ever it is justifiable to look at the conduct of the agent, it can only be looked at with the very greatest caution. To hold otherwise would often mean that persons would find themselves held liable as principals in respect of acts which they had never authorised. In the present case I am quite unable to find any sufficient evidence, and I decline to draw the requisite inferences. That disposes of one branch of the argument.

The other matter relied upon is this: that in fact there never was any notice of claim within the meaning of clause 24 of the charterparty. The only document relied upon there is the letter of Mar. 19, 1931, addressed to the Trade Delegation, which is in these terms:

> For the sake of good order, please note that the owner reserves his right to claim for compensation for damage to the ship which occurred on account of her being left in the ice by the ice-breaker

and so on. I am unable to construe that paragraph in the letter and the following paragraphs as amounting to a claim. It seems to me that what they are saying is this: "At the present moment we do not know whether the facts justify a claim or not; we may or may not make a claim at some future time, and we reserve our right, if we think fit to do so, to make such a claim." It appears to me that, if that paraphrase really represents the true meaning of this document, it is not proper to say that that is a notice of claim. In my judgment, the phrase "notice of claim" demands something more precise and demands, at the very least, notice that a claim is made. A notice that at some future date a claim may or may not be made, according to circumstances, is insufficient. The learned judge points out in his judgment that one of the advantages of a clause of this kind is that it enables investigations to be made and evidence to be collected before the expiration of undue delay, and I think that is a pretty obvious advantage of the clause. What is a person to do who receives a notice, not that a claim is being made, but that at some future time a claim may or may not be made? Is he to incur the expense, and take the trouble, of collecting evidence to meet a claim which may never be made? In my judgment, the claim under clause 24 must be a claim which is a present claim, in the sense that the claim is definitely put forward, anything which merely amounts to an expression of intention to make a claim or not to make a claim, as circumstances may dictate in the future, would be insufficient. I agree that this appeal must be allowed.

SCOTT, L.J.: I agree with both judgments which have been given, and desire to add but very little. I do, however, want to express my personal opinion that a clause like clause 24 in this charterparty is a very important clause in modern business relations. It is put in the

charterparty in order to be acted upon and as a protection for the party against whom claims may be made. I agree with the learned judge in his view that the clause is mutual, and there has been no suggestion in argument in this case that it is not mutual. The test of the sort of notice that the clause contemplates is, I think, best illustrated by the letter of Mar. 19, 1931, in which the owners said in regard to their claim for damages for detention :

> We hereby beg to send you the owner's claim with the enclosed bill for extra coal consumption, as well as the bill for loss of time and the log extract.

Those documents are not all here. It is quite plain, however, from that passage that full particulars of the claim were at that time sent. I do not for a moment suggest that the claim would not be a good description of the claim for the purpose of the notice, if it were less than that. I will deal with that in a moment. But that is the sort of thing that the clause contemplates—something, at any rate, definite, even although it may be wanting in particularity.

In this case there are three questions which arise. The first one is this : assuming that the passage on the second page of the letter to which I have just referred, where there is a reference to the claim for compensation for damage, contains a sufficient description of the nature of the claim sued on to satisfy clause 24, did that letter, in that paragraph consisting of two sentences, convey a definite notice that a claim was going to be made thereafter, or was it a mere intimation that the plaintiffs were not claiming at the moment although very probably they were going to do so in the future ? It may even have been an indication of present intention, without amounting to what I think is essential, namely, notice of a decision to claim. In my view, the answer to that is : No, it was not a definite notice. If one looks at the letter of June 20, 1931, one sees there is a perfectly definite notice of the claim in respect of damages for detention, and then this sentence follows :

> The claim for compensation in respect of damage which the ship has suffered in the ice we shall probably have to take up with Arcos in London as the amount deposited does not cover the damage.

I agree that that reads as if they had an intention to take it up, but a mere notice of a probable intention, or an intention probably to make a claim in the future, is not, in my view, a notice within the clause.

The second question is this : assuming that it was a notice, was it a sufficient description of the nature of the claim to satisfy the clause ? On that I entirely agree with what Greene, L.J., in particular said just now : namely, that the content of the claim must be made sufficiently clear to enable the party against whom the claim is to be made to know the sort of claim he has to meet and to take steps for the purpose of getting evidence, and so on. Again I say quite definitely, and in regard

to the second question even more strongly than in regard to the first question, that I think it was not a notice of claim within the clause.

The last question is this: assuming that both those questions are answered contrary to my view and are answered in favour of the shipowner, still, was the notice of claim given to a person designated in the charter as the person to receive the claim? Primarily, that means the charterer. There is no question at all that the notice under clause 24 primarily means "to the charterer," or "to his duly authorised agent who is authorised to receive the claim." There is no suggestion that any notice was given to Arcos, so that that question does not arise. But it is said by the shipowners that it was enough to give the notice to what is described as Exportles, Moscow. That raises the question to which my colleagues have referred: namely, the passage in the judgment of Greer, L.J., in the earlier case and the citation of it by the learned judge in this case. I agree with what they have said and add nothing to it, except this: that, in the absence of evidence of Russian law, including Russian constitutional law, then the identification and description of the parties, the description of their position, the questions of agency, and so on, that fall to be determined by the court in this case must be determined according to English law, because there was no evidence of Russian law given. What in English law would be the natural interpretation to give, for instance, to "Messrs. Exportles, Moscow," which is the phrase used in one or two of the letters, or to the expression "Exportles, Moscow," which is used in the charterparty? I have no doubt that the natural interpretation of it is either that it is a firm or that it is a corporation of some sort under foreign law, and is a person within the eye of the English law; in that case the interpretation of the charter would be that Exportles was a legal *persona* acting as the principal for whom Arcos, Ltd., signed the charter. Arcos assumed liability and may well have made the contract on behalf of another person as principal, and it may well be that notice to that other person would, in these peculiar circumstances, be a sufficient notice to satisfy clause 24, which calls for notice to the charterer. That being so, I agree with what my brethren have said, that in this case there was no evidence at all that the Trade Delegation of the Russian Government at Oslo were agents for this legal person Exportles, Moscow. In my view, the learned judge's judgment is based entirely on the conclusion of law which he accepts from the earlier judgment of Greer, L.J., saying that judicial notice may be taken in our courts that in Russia there is nobody at all capable of making a contract except the Russian Government, and that everybody else in Russia is agent for that Government. I put it in that way because I can see no means of stopping short of that wide conclusion, following upon the sentence in the judgment of Greer, L.J., or, at any rate, of the learned judge below, that a monopoly

of all trade transactions carried on to and with Russia is vested in the Russian Government. That is an inference which cannot be drawn without evidence, and one which does not entitle the learned judge in this case to infer that notice was given to somebody having authority on behalf of the charterers to receive it.

Appeal allowed with costs.

Solicitors: *Middleton, Lewis & Clarke* (for the appellants); *Sinclair, Roche & Temperley* (for the respondents).

[*Reported by* Derek H. Kitchin, *Barrister-at-Law.*]

ADIB EL HINNAWI *v.* YACOUB FAHMI ABU EL HUDA EL FARUQI.

[Privy Council (Lord Atkin, Lord Alness and Lord Maugham), **February 27, 1936.**]

Bills of exchange—Promissory note—Inadequacy of consideration—Issue for the court—Burden of proof.

Where in an action for the payment of a sum alleged to be due to the plaintiff upon a promissory note the defendant pleaded that there was no consideration for the note:—

Held: (i) that inadequacy of consideration affords no relevant answer to a demand upon a promissory note.

(ii) it is not for the court to enquire into the adequacy of the consideration for the note, but to consider whether or not there had or had not been any consideration given.

(iii) the burden of proof that no consideration had been given was on the defendant.

[**EDITORIAL NOTE.** The statement of the law as given by their Lordships has been accepted as law for many years, but authority upon the point is very sparse and there are far more cases which, while they accept the general principle, decide that it is not applicable in particular circumstances, e.g., unconscionable bargains or cases of such patent and gross inadequacy as to lead to a presumption of fraud. The clear statement of the general principle by their Lordships is, therefore, of interest as being the only modern authority directly upon the point and as being the authority of the highest court for this proposition.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 2, p. 648, para. 891, and for the Cases, see DIGEST, Vol. 6, p. 181, Nos. 1131, 1132.]

Appeal from a judgment of the Supreme Court of Palestine, dated Apr. 5, 1932, reversing a judgment of the District Court of Jaffa, dated Nov. 9, 1931, and entering judgment for the respondent against the appellant for the equivalent in Palestine currency of £4,000, with interest and costs.

On Feb. 3, 1930, the appellant in an appeal to the Supreme Court of Palestine, pleaded *inter alia* that no consideration for a promissory note sued upon had been given, and pointed out that no decision on that matter had been given by the District Court. On May 26, 1931, the appeal was heard by the Supreme Court of Palestine, when they remitted the case to the District Court of Jaffa, in order that the question whether consideration had been given for the promissory note might be considered, and, after evidence being given, if that should be thought necessary, be determined. The District Court heard evidence on the matter, and on Nov. 9, 1931, they delivered judgment. They held that there was no real consideration for the promissory note, and, being of opinion that the services rendered to the deceased by the respondent were not equivalent to the value of the note, they dismissed the action.

The respondent appealed to the Court of Appeal, and, on April 5, 1932, that court allowed the appeal, set aside the judgment of the District Court, and entered judgment in favour of the respondent, with costs. The Court of Appeal held that the burden was on the appellant to show that no consideration had been given by the respondent for the note, and that that defence had not been made out. They further held that it was not for the court of first instance to enquire into the adequacy of the consideration for the note, but to consider whether or not there had or had not been any consideration given.

By orders dated May 26, 1932, and Sept. 17, 1932, the appellant obtained leave to appeal to His Majesty in Council,

John Morris, *K.C.*, and *A. Davies*, for the appellant.

B. B. Stenham and *F. Whitworth*, for the respondent.

The judgment of their Lordships was delivered by LORD ALNESS.

LORD ALNESS: The appellant's counsel argued (1) that there was no consideration given for the promissory note, and (2) that the promissory note was obtained by undue influence on the part of the respondent—particularly in view of the relationship of husband and wife which subsisted at the date when the note was made between the respondent and the deceased Fatmeh.

With regard to the first ground of appeal, their Lordships are satisfied that consideration was given for the promissory note, and that the judgment of the Court of Appeal on that point is unassailable. They are further of opinion that, having regard to the terms of the promissory note, the alleged inadequacy of consideration affords no relevant answer to a demand made upon it. With regard to the plea of undue influence, their Lordships are of opinion that, inasmuch as the plea was not pressed in the courts below, with the result that there is neither specific evidence nor any direct finding with regard to it, they are absolved from the necessity of dealing with the matter in detail now. It is manifest from the proceedings that it was open to the appellant to have urged the plea

in the courts below to an issue—in other words, to have claimed and obtained a judicial decision upon it. The appellant omitted to do this, and it is therefore quite impossible, in their Lordships' opinion, on the materials available to them, to set aside the judgment appealed against, and to affirm the plea of undue influence. Their Lordships are further of opinion that, having regard to the sum at stake between the parties, and to the protracted character of the litigation regarding it which ensued, it would not be reasonable or proper for the Board now to make a remit for enquiry into the question of undue influence, as they were invited by the appellant to do, and they must accordingly decline to take that course. In the circumstances recited, the appeal fails, and the appellant must pay the costs of it. Their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Herbert Oppenheimer, Nathan, Vandyk Mackay* (for the appellant); *Samuel Sebba* (for the respondent).

[*Reported by* S. P. Khambatta, Esq., *Barrister-at-Law.*]

PARENT TRUST & FINANCE CO., LTD.

[CHANCERY DIVISION (Bennett, J.), **March 18, 19, and 20, 1936.**]

Guarantee—Guarantee of secured loan—Whether security for loan a condition precedent—Usual clause for guarantors to be liable as principal debtors.
Companies—Winding-up—Debt carrying interest—When interest ceases to run—Rate of interest.

By a deed of guarantee for the repayment of a loan of £250,000 and interest, which recited that the lenders had at the request of the guarantors advanced to the borrowers £250,000 upon security of a charge on certain shares, the guarantors covenanted, in the event of the borrowers failing to make the repayments provided for, forthwith to repay to the lenders the said sum of £250,000 with interest at the rate of 8 per cent. per annum. The deed further provided that whatever the position between the lenders and the borrowers, the guarantors should be liable for all moneys due as principal debtors and they were not to be released from liability by reason of time being given by the lenders or by their taking no steps to protect their securities. The shares above mentioned were at no time secured and had not in fact been issued. Upon default in repayment of part of the loan the liquidator of the guarantors rejected the proof by the liquidators of the lenders, contending that the security of the charge on the shares was a condition precedent to the guarantee :—

HELD : (i) upon a proper construction of the deed of guarantee, there was no such condition precedent and the guarantors having precluded themselves from equitable protection, were bound by their guarantee as principal debtors.

(ii) interest upon the sum outstanding was payable only up to the date on which the petition to wind up the guarantors was presented and not up to the date of the order to wind up.

(iii) the rate of interest payable should be reduced from 8 per cent. to 5 per cent. per annum on all outstanding interest.

[**EDITORIAL NOTE.** This case discusses three quite separate issues : (i) the construction of the guarantee ; (ii) the date up to which interest can be charged ; and (iii) the rate at which such interest can be charged. The construction point is of interest, as it deals with the effect of the inclusion of the usual clause that the guarantors shall be liable as principal debtors. Draftsmen of guarantees have doubtless considered this clause as relating solely to future events, but it is here used to rebut a plea of non-disclosure of a material fact at the time the guarantee was executed. On the other points conflicting authorities are discussed and the decision is important in these technical matters of company winding up, upon which there has hitherto been some conflict of authority.

AS TO PROOF FOR INTEREST, see HALSBURY, Hailsham Edn, Vol. 5, pp. 679, 680, para. 1134, and FOR THE CASES, see DIGEST, Vol. 10, pp. 932-933, Nos. 6385-6397.]

Cases referred to :—

(1) *Re Agricultural Wholesale Society*, [1929] 2 Ch. 261 ; Digest Supp.

(2) *Re Law Car and General Insurance Corpn.*, [1913] 2 Ch. 103 ; 10 Digest 1089, *7623*.

(3) *Re British American Continental Bank, Ltd., Goldzieher and Penso's Claim*, [1922] 2 Ch. 575 ; 35 Digest 175, *53*.

(4) *Re Humber Ironworks & Shipbuilding Co., Warrant Finance Co.'s Case* (1869), 4 Ch. App. 643 ; 10 Digest 933, *6372*.

(5) *Re Contract Corpn., Ebbw Vale Co.'s Case* (1869), 5 Ch. App. 112 ; 10 Digest 981, *6769*.

(6) *Re Whitaker*, [1901] 1 Ch. 9 ; 24 Digest 818, *8508*.
(7) *Re Bush, Lipton (B.) Ltd.* v. *Mackintosh*, [1930] 2 Ch. 202 ; Digest Supp.
(8) *Seaton* v. *Burnand, Burnand* v. *Seaton*, [1899] 1 Q.B. 782 ; 26 Digest 212, *1674*.
(9) *Coyte* v. *Elphick* (1874), 22 W.R. 541 ; 26 Digest 73, *525*.
(10) *Lainson* v. *Tremere* (1834), 1 Ad. & El. 792 ; 21 Digest 254, *790*.
(11) *Bowman* v. *Taylor* (1834), 2 Ad. & El. 278 ; 21 Digest 257, *810*.
(12) *Roberts* v. *Security Co.*, [1897] 1 Q.B. 111 ; 21 Digest 261, *829*.
(13) *Poulton* v. *Moore*, [1915] 1 K.B. 400 ; 21 Digest 256, *799*.
(14) *Bonser* v. *Cox* (1841), 4 Beav. 379 ; 26 Digest 72, *516*.
(15) *Evans* v. *Bremridge* (1855), 2 K. & J. 174 ; 26 Digest 72, *517*.
(16) *Cooper* v. *Evans* (1867), L.R. 4 Eq. 45 ; 26 Digest 78, *557*.
(17) *Bowes* v. *Shand* (1877), 2 App. Cas. 455 ; 17 Digest 244, *582*.
(18) *Stroughill* v. *Buck* (1850), 14 Q.B. 781 ; 21 Digest 252, *771*.
(19) *Brooke* v. *Haymes* (1868), L.R. 6 Eq. 25 ; 21 Digest 278, *948*.
(20) *Re London, Windsor and Greenwich Hotels Co., Quartermaine's Case*, [1892] 1 Ch. 639 ; 10 Digest 950, *6506*.
(21) *Re Wells*, [1929] 2 Ch. 269 ; Digest Supp.

Application against the rejection of a proof made upon a guarantee. The proof was rejected upon the ground that the guarantee was obtained by a misrepresentation and was never binding upon the guarantors. If the proof was admitted further questions were raised as to the date up to which the guaranteed loan carried interest and as to the rate of interest. The various points were argued and decided separately.

The facts are fully stated in the judgment.

Sir William Jowitt, K.C., D. N. Pritt, K.C., and *Wilfrid Hunt* for the liquidators of the Mercantile Marine Finance Corpn., Ltd.

Gavin Simonds, K.C., and *C. R. R. Romer* for the liquidator of the Parent Trust and Finance Co., Ltd.

Sir William Jowitt, K.C.: My clients, the Mercantile Marine Corporation, have advanced money to Austin Friars Trust, Limited, on a guarantee at the request of the Parent Company who now seek to escape from their liability under the guarantee on the grounds that they have been induced to give it on condition that the loan was secured by a charge on shares which never in fact existed. There is no suggestion that either party knew of the invalidity of the shares in question, but there is a point on estoppel by recital. The Parent Company had many previous dealings with Austin Friars Trust, including loans. As a principle of law there is a distinction between an extension of a guarantee and of a contract of insurance (*Seaton* v. *Burnand* (8)). The test there outlined by Romer, L.J., was subsequently referred to by Scrutton, L.J., as the best applicable. The Parent Company have requested Mercantile Marine to advance to Austin Friars and cannot now say that the facts were inaccurate. On the document as a whole the shares were only referred to in a recital which in turn referred to the schedule and this cannot constitute a basic condition. The guarantors

were to be principal debtors just as much as Austin Friars. There was a provision in the contract to that effect. If Austin Friars are still liable the Parent Company are no less and no more so (*Coyte* v. *Elphick* (9); SIR SIDNEY ROWLATT ON PRINCIPAL AND SECURITY, at p. 275; SPENCER BOWER ON ESTOPPEL, at p. 159). The liquidator cannot now be heard to deny that there was a security. It cannot be said that the statement of the existence of a charge was a representation of my clients only. It may be a representation of both parties. (EVEREST & STRODE ON ESTOPPEL, 3rd Edn., p. 179; *Lainson* v. *Tremere* (10); *Bowman* v. *Taylor* (11)). If, of course, it is our representation, then the Parent Company can deny liability (*Roberts* v. *Security Company* (12); *Poulton* v. *Moore* (13)). On construction of the document as a whole it cannot be said that the existence of the shares was a basic condition. Secondly, considering the extensions, there is no statement there to suggest that the Iron Industries shares still remained pledged, but in fact they had been handed back. The existence of them is not a condition precedent. Estoppel is only material if we are wrong on construction.

Gavin Simonds, K.C.: The document itself shows that what the Parent Company guaranteed was a secured loan. We are not trying to get out of the contract. We say that there never was a secured loan or any effective guarantee. The words are "at the request of" the Parent Company but they are common form. The recital is quite clear. The other provisions that no act or omission or alteration of position between the debtor and creditor shall prejudice the position between the creditor and the guarantor are in common form.

In a guarantee of a secured loan when in fact there is no security, there is no liability and the guarantee does not operate (SIR SIDNEY ROWLATT ON PRINCIPAL AND SURETY, p. 275). The guarantee shows on its face that it is one of a loan secured by *inter alia* certain shares and the guarantor is only liable for such a loan (*Coyte* v. *Elphick* (9).) The principle is that the surety is released if the deed is not in accordance with the facts (*Bonser* v. *Cox* (14)). He is not bound if the condition contemplated by him is not in existence, nor if there is any difference between the transaction as it appeared on paper and as it actually was. In *Evans* v. *Bremridge* (15) the surety thought he was to have a co-surety, on whom he relied, but the latter never executed the deed. How can it be said that the absence of security is a matter of no importance? (*Cooper* v. *Evans* (16).) The existence of a secured loan is the condition of any liability. There is no difference between *Coyte* v. *Elphick* (9), on which I rely, and the present case, either in law or equity. There was the same common form clause that the surety's liability was not to be affected by time being given to the debtor or by any other dealing between him and the lender. The result should be the same in this case and the

surety be released. The obligation in fact never arises (*Bowes* v. *Shand* (17)). The objection on the estoppel point that we were parties to the recital is an untenable proposition (*Stroughill* v. *Buck* (18)). Where the recital is a statement of what A. has done, it binds A. and not B. The principle is that a party to a deed is estopped by a recital in it of what he does or has done. He is presumed to have special knowledge of that. Estoppel is a rule of evidence and by it you are precluded from denying a fact recited if someone has acted on it to his detriment. B. cannot be estopped from denying the accuracy of a recital by which A. has induced him to do something he would not otherwise have done (*Bowman* v. *Taylor* (11) ; *Stroughill* v. *Buck* (18) ; *Brooke* v. *Haymes* (19)). The recital was a representation on which we acted. The evidence of former dealings between the Parent Company and Austin Friars is immaterial.

D. N. Pritt, K.C., in reply : If we are right upon construction the question of estoppel does not arise. *Coyte* v. *Elphick* (9) is on a condition precedent. There may be an equitable relief by which the guarantor can say that it is unreasonable to hold him to his bargain when the fact on the strength of which he consented has not materialised (Sir Sidney Rowlatt on Principal and Surety, p. 275). The Parent Company are trying to escape their contract. The loan was in fact well secured by two other groups of shares in the schedule. The liquidator must contend that the loan had to be secured on all three groups of shares taken as one group. He must show that there is a condition necessary to the business efficacy of this transaction that every single share in the schedule was in existence and charged. It must be all or nothing. No one has suggested that there was any condition that the securities must be of any value or even that it was a legal charge. It might be an equitable charge capable of being over-ridden. His contention must be that there was a condition that the Iron Industries shares were there if only for five minutes. An unsecured debt may be just as good as a secured one. What alters the guarantor's rights is the fact that he accepts the principal's liability (Rowlatt, p. 276). If he is the principal it does not matter whether there is any security or not. The creditor is thus doubly secured, first against the liability of the guarantor never arising, and secondly by the prevention of the equitable rules for the guarantor's relief from operating.

Bennett, J. : This is an application by the liquidators of the Mercantile Marine Finance Corporation, Ltd., against the decision of the liquidator of the Parent Trust & Finance Company, Limited, rejecting the proof by the liquidators of the Mercantile Marine Corporation. That proof was made upon a guarantee dated Mar. 20, 1929, and it was for a very large sum, £184,685 1*s.* 1*d.* The liquidator rejected the whole of the proof on the grounds that such contract of guarantee

was made subject to a condition and was entered into on the representation that the loan was secured by a valid and effective charge upon the shares mentioned in the schedule. Whereas in fact no security did exist or had ever existed. The shares in Iron Industries, Limited, had never been issued, and it followed that the contract was not binding upon them, and indeed they had repudiated it by a letter dated Dec. 16, 1929.

The proof was based upon that guarantee. Either before or simultaneously with it the Mercantile Marine Finance Corpn., Limited, had advanced to Austin Friars Trust, Limited, £250,000 in accordance with the terms of a deed dated Mar. 20, 1929. After a recital that Austin Friars Trust, Ltd., were in possession of the securities set out in the schedule, Austin Friars, Limited, in consideration of the loan of £250,000, the receipt whereof was thereby acknowledged, agreed to repay on June 20 next, together with interest at the rate of 8 per cent. per annum, and there was a provision that if the rate at the Bank of England should be increased the borrower was to pay increased interest at a like rate. By clause 2 Austin Friars, Limited, charged the shares set out in the schedule thereto as security for the repayment of the advance, and the securities in the schedule included 275,000 fully-paid £1 shares in an undertaking called Iron Industries, Ltd. The recital reads:

> Whereas the corporation have, at the request of the guarantors, advanced to the Austin Friars Trust, I imited (hereinafter called the borrowers), the sum of £250,000 upon security of a charge dated the day of March, 1929, on the shares, particulars of which are set out in the schedule hereto.

And these included 275,000 Iron Industries, Ltd., shares, and the deed continued:

> in consideration of the corporation having at the request of the guarantors advanced to the borrowers the said sum of £250,000 the guarantors hereby covenant with the corporation that in the event of the borrowers failing to repay together with interest as provided in the charge on the said shares forthwith to repay to the corporation the said sum of £250,000, together with interest due or to become due or under any judgment recovered hereunder at the rate of eight per centum per annum.

Then followed the provision for increase of interest if the Bank rate was increased. And the deed went on to say that whatever the position between the Corporation and the borrowers, the guarantors should be liable as principal debtors for all moneys due, and they and their successors were not to be released from liability by reason of time being given by the Corporation or by their taking no steps to protect their securities, or because of any other dealing, act or omission which, but for this provision, would have released the guarantors.

On June 21, 1929, the borrowers repaid £50,000, and on the same day another document was drawn under the guarantors' seal extending

the time for the payment of the balance from June 20 to Aug. 20, in which the Parent Trust & Finance Co. covenanted that their guarantee should remain in force in every respect. On Aug. 21, 1929, a further sum of £50,000 was paid, and there was a similar deed containing a covenant extending the time for payment until Oct. 20.

Austin Friars Trust, Ltd., are in liquidation and they are not in a position to pay the principal debt, together with interest. On the terms of the document without anything implied into it, the guarantors are liable. The terms make it plain that they have bound themselves to pay to the creditors what remains due of the £250,000.

The first ground on which the guarantors contend that they are not bound by the contract is that on which the liquidator of the Parent Trust & Finance Company rejected the proof. It is stated that the contract of guarantee dated Mar. 20, 1929, contained a condition that the loan from the Mercantile Marine Finance Company to Austin Friars Trust, Ltd., was or should be secured by a charge and that non-fulfilment would release the Parent Company. There was an antecedent representation made in the letter which enclosed the document and the recital of guarantee. This was untrue. The shares in Iron Industries, Ltd. were at no time secured, and had not in fact been issued.

It is common ground between the parties that the loan between Mercantile Marine Finance Corporation and Austin Friars Trust, Limited, was not in fact secured by a charge on the 275,000 shares in Iron Industries, Ltd., although a paper bearing a seal was handed to the Mercantile Marine Finance Corporation which purported to be an allotment letter. In point of fact, it was not a document of title to the Iron Industries shares at all. The facts are therefore not in dispute and the first question to be determined is as to whether as a matter of construction there ought to be implied into the document of Mar. 20, 1929, the condition that the loan from Mercantile Marine Finance Corporation to Austin Friars Trust, Ltd., should be secured by an effective charge. Before you can imply a condition, there must be a necessity for the business efficacy of the document that it should have been included. I am assisted by consideration of the terms of the document itself and whether the parties, particularly the guarantors were attaching any real importance to the existence of these shares in the creditors as security, and when one finds that the guarantors left the creditors free to release the shares or make any other arrangement with the debtors, I am unable to come to the conclusion that the parties intended this condition to be implied. Quite apart from that implication the liquidator says that by law the Parent Company is released because what was guaranteed was a secured debt and being such the guarantor is released if he finds there is no security. He founds his contention on a passage in Sir Sidney Rowlatt's work on the Law of Principal and Surety

(2nd Edn., at page 276). [His Lordship read the terms of the passage.] A number of authorities are included in this passage. But on behalf of the Mercantile Marine Corporation, it was argued by Mr. Pritt that the crucial words are "as surety" and if you find that the guarantor has in effect contracted himself out of the general conditions applicable between principal and surety, that passage has nothing to do with the case, and the Parent Company have by the form of the contract precluded themselves from equitable protection. The guarantors had covenanted with the Corporation that they would repay in the event of the borrowers failing, and there is another covenant that whatever should be the position thereafter the guarantors should "be considered and be bound as principal debtors." One must give some sort of meaning to a solemn obligation of this kind. I see no reason for not construing it to mean what it says. The guarantors have taken on themselves the liability as though they were principal debtors. In those circumstances the general law on which the liquidator relied is no answer to the applicant's claim. For these reasons, as far as the general grounds are concerned, the liquidator's decision must be reversed.

Sir William Jowitt, K.C.: There are two further subsidiary points of considerable difficulty which it is necessary to decide. The first is the date to which interest on the loan is payable, whether up to June 28, 1932, which is the date of the presentation of the petition to wind up against the Parent Company or up to July 11, 1932, which was the date of the winding up order. The section is the Companies Act, 1929, s. 175 (2):

> In any other case [than where before the petition a resolution has been passed for voluntary winding up] the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.

The liquidator says that the date of the petition is the vital date. (*Re London, Windsor and Greenwich Hotels Company, Quartermaine's Case* (20); *Re Agricultural Wholesale Society* (1); *Re Wells* (21).) The contrary view appears in *Re British American Continental Bank, Ltd.*, (3), which was not cited to MAUGHAM, J., in *Re Agricultural Wholesale Society* (1) and in *Re Law Car & General Insurance Corpn.* (2).

Quartermaine's Case (20) is the only one which actually fixes the presentation of the petition as the date and that was a voluntary winding up.

Wilfrid Hunt (following on the same side): The Bankruptcy Rules rr. 97 to 99 are important, as a group, in fixing the order as the date. And rule 92 is the rule with regard to the form of proof which is form 59. These rules are to be incorporated and they take the date down to that of the receiving order. P. O. LAWRENCE, J., mentions the practice in *Re British American Continental Bank* (3); and COZENS-HARDY, M.R., in *Re Law Car and General Insurance Corpn.* (2), at pp. 118-119. There are overwhelming authorities that the order is the critical date.

Gavin Simonds, K.C.: The decision of MAUGHAM, J., in *Re Agricultural Wholesale Society* (1), was right and is binding upon the court. My friends have taken the observations of the learned judge in another case which was not directed to interest at all. Interest is on a footing of its own, quite different from rent or annuities (*Warrant Finance Company's Case* (4)). With regard to sect. 262, we all know that for certain purposes the order is the critical date, but on the matter of interest these other cases are not authorities (*Ebbw Vale Company's Case* (5)).

BENNETT, J.: The question to be determined is whether upon the principal sum for which the applicants have proved they are entitled to calculate the interest up to June 28, 1932, which was the day on which the petition to wind up the Parent Company was presented and when the winding up commenced or up to July 11, 1932, which was the day on which the winding up order was made. The sum involved, from the notice by the liquidator rejecting the proof is £407 8*s.* 0*d.* The point was expressly decided by MAUGHAM, J., in *Re Agricultural Wholesale Society* (1), and it has been argued that I am not to follow that case because of a conflict with a number of earlier authorities to which MAUGHAM, J.'s attention was not drawn. The authorities which are said to be in conflict with his decision are: First, a decision of the Court of Appeal in *Re Law Car and General Insurance Corpn.* (2), in which there is a passage in the judgment of LORD COZENS-HARDY, M.R., at page 118, which it is said decides that the critical date for the ascertainment of debts provable against the company is not the commencement of the winding up, but the date of the winding up order. The second authority is a decision of P. O. LAWRENCE, J., in *Re British American Continental Bank, Ltd.* (3), where the learned judge fixed the date, in an action for damages for breach of a contract in foreign currency for conversion into English currency, as the date of the winding up order. In the passage on page 582 relied upon he says:

> A date has necessarily to be fixed on which all debts and other liabilities are to be treated as definitely ascertained, both for the purpose of placing all creditors on an equality and for the purpose of properly conducting the winding up of the affairs of the company.

None of these cases deals exactly with the point decided by MAUGHAM, J., and I propose to follow his decision. It seems to me that it follows the earlier decisions of the Lords Justices in *Warrant Finance Company's Case* (4). It has been said that the judgments in that case were ambiguous because they fixed the date as "the date of the winding up" which might mean either. I think that, although there is ground for suggesting that the language was ambiguous, the Lords Justices clearly meant the date on which the petition was presented, and GIFFARD, L.J., at the conclusion of his judgment says that another reason for fixing

the date of the winding up is that on that date creditors whose debts do not carry interest are stayed from recovering judgment and so from obtaining a right to interest. And that date must have been the presentation of the petition, which is the date from which he may be denied. I think it is also clear what this "commencement" means from *Ebbw Vale Co.'s Case* (5). This is in the same year but in the next volume as the earlier case and the reporter in the headnote plainly indicates what his understanding of the *Warrant Finance Co.'s Case* (4) was. He says :

> The decision in the *Warrant Finance Company's Case* that no proof can be made in the winding up of an insolvent company for interest later than the commencement of the winding up, was not merely a settlement of the practice for the future, but a declaration of the law as it then stood.

It is quite clear from that language, one case having been decided in June and the other in December of the same year what his understanding was. Following the decision of MAUGHAM, J., therefore, the interest must stop on June 28, 1932, and the effect of that is again to reverse the decision of the liquidator.

Jowitt, K.C. : We also say that we are entitled to interest at 8 per cent. up to June 28. See MAUGHAM, J., at p. 265 of the *Agricultural Wholesale Society* case (1). The liquidator says the rate should be only 5 per cent. The question is whether sect. 66 of the Bankruptcy Act is incorporated in the winding up rules. *Re Wells* (21) follows the decision of MAUGHAM, J., in the *Agricultural* case (1). In *Re Bush* (7), at p. 205, LUXMOORE, J., discusses *Re Whitaker* (6), and there sect. 66 of the Bankruptcy Act, 1914, was held to apply ; but the *Agricultural* case (1) was one of a winding up and *Re Bush* (7) was one of an insolvent estate, and I invite the court to follow MAUGHAM, J., in *Re Agricultural Wholesale Society* (1).

BENNETT, J. : *Re Whitaker* (6) was not brought to the attention of MAUGHAM, J., in the *Agricultural Wholesale Society* case (1). I shall follow the later case before LUXMOORE, J., *Re Bush* (7), and the rate must be reduced from 8 per cent. to 5 per cent. The order I must make is to reverse or vary the liquidator's decision by ordering proof to be admitted to the extent of £150,000 together with interest at the rate of 5 per cent. from Aug. 21, 1929, down to June 28, 1932.

Solicitors : *Simmons & Simmons* (for the liquidators of the Mercantile Marine Finance Corpn., Ltd.) ; *Linklaters & Paines* (for the liquidator of the Parent Trust and Finance Co., Ltd.).

[*Reported by* CHARLES E. EDEN, ESQ., *Barrister-at-Law.*]

WILLOUGHBY *v.* ECKSTEIN.

[Court of Appeal (Slesser, Romer and Greene, L.JJ.), **March 2, 1936.**]

Practice—Pleading—Part of statement of claim showing no cause of action—Striking out part—R.S.C. Ord. 19, *r.* 27 ; *Ord.* 25, *r.* 4.

The plaintiff's statement of claim contained a claim for infringement of the plaintiff's right to light from ancient windows and a further claim for nuisance alleging that the carrying up of the defendant's building to a greater height had interfered with the proper escape of smoke and fumes from the plaintiff's chimneys and such interference had caused a nuisance to the plaintiff :—

Held : having regard to the case of *Bryant* v. *Lefever* (1879), 4 C. P. D. 172 ; 19 Digest 61, *349*, the claim for nuisance disclosed no cause of action and should be struck out. The court is entitled to deal with the law as it think it stands.

[**EDITORIAL NOTE.** The jurisdiction to strike out a claim as disclosing no cause of action is one that presents considerable difficulty and the decisions of the courts necessarily appear to some extent to conflict. There are cases where it is quite clear that it is impossible for a claim to succeed ; but in the present case there was only one decision precisely in point—a decision of the Court of Appeal some fifty years old. It might, therefore, have been said that the point was an arguable one, though there was no chance of success, unless the case was taken to the House of Lords. In the present case, however, there was also reason to think the authority against the plaintiff's claim was rightly decided as being in accord with the general principle of the law on the point, and the Court of Appeal held that the clause in the statement of claim disclosed no cause of action, because, as Slesser, L.J., said : "We may deal with the law as we think it stands."

As to Claims disclosing No Cause of Action, see HALSBURY, 1st Edn., Vol. 22, Pleading, pp. 435, 436, para. 879 ; and for the Cases, see DIGEST, Pleading, pp. 73-82, Nos. 634-687. For R.S.C. Ord. 19, r. 27 and Ord. 25, r. 4, see YEARLY SUPREME COURT PRACTICE, 1936, pp. 327-330 ; 393-396.]

Cases referred to :

(1) *Bryant* v. *Lefever* (1879), 4 C. P. D. 172 ; 19 Digest 61, *349*.

(2) *Vacher and Sons, Ltd.* v. *London Society of Compositors*, [1912] 3 K.B. 547 ; Digest Pleading, 92, *776*.

(3) *Harris* v. *De Pinna* (1886), 33 Ch. D. 238 ; 19 Digest 127, *850*.

(4) *Davis* v. *Town Properties Investment Corpn., Ltd.*, [1903] 1 Ch. 797 ; 31 Digest 124, *2574*.

(5) *Morgan* v. *Fear*, [1907] A.C. 425 ; 19 Digest 129, *860*.

(6) *Heugh* v. *Chamberlain* (1877), 25 W.R. 742 ; 36 Digest 785, *2641*.

(7) *Liardet* v. *Hammond Electric Light and Power Co.* (1883), 31 W.R. 710 ; 36 Digest 672, *1551*.

(8) *London Corpn.* v. *Horner* (1914), 111 L.T. 512 ; Digest Pleading, 71, *620*.

Appeal from a decision of Bennett, J., refusing an application by the defendant under R.S.C. Ord. 19, r. 27, asking the court to strike out part of the plaintiff's statement of claim on the ground that it was

unnecessary and embarrassing and disclosed no reasonable cause of action. The paragraph of the statement of claim referred to alleged that by reason of the carrying up of the defendant's building beyond its previous height, the plaintiff's chimneys and flues had been interfered with and the proper escape of smoke and fumes interfered with.

G. A. Rink for the appellant: The paragraph objected to discloses no reasonable cause of action: *Bryant* v. *Lefever* (1), *Harris* v. *De Pinna* (3), *Davis* v. *Town Properties Investment Corpn., Ltd.* (4), *Morgan* v. *Fear* (5). Where several different defences are put in, the one may be kept in though others are struck out: *Heugh* v. *Chamberlain* (6), *Liardet* v. *Hammond* (7), *London Corpn.* v. *Horner* (8).

L. W. Byrne for the respondent: The clause in the statement of claim objected to cannot embarrass the defendant. It is not unnecessary having regard to the nature of the claim.

SLESSER, L.J.: In our opinion this appeal succeeds. This matter arises upon the dismissal of a summons under R.S.C. Ord. 19, r. 27, asking the court to strike out matters in a statement of claim.

The matter complained of is in para. 5 of the statement of claim. The statement of claim alleges that the plaintiff is the lessee and occupier of premises, certain rooms of which derive their light from ancient windows overlooking the defendant's premises, and that the defendant started alterations to his premises raising the height of the buildings with the result that the plaintiff has been deprived of light. This is a claim for obstruction of light and is properly preferred. There is also a claim contained in para. 5 of the statement of claim that

> the carrying out of the defendant's building beyond the height indicated . . . has also interfered with the proper escape of smoke and fumes from the flues

of the plaintiff's premises and

> such escape has caused a nuisance to the plaintiff.

That plea is founded wholly upon nuisance and is not one sustainable in law. The case in point is *Bryant* v. *Lefever* (1) and I do not think it necessary for me to say more than this, that the decision in that case covers the present case. There is no cause of action here for nuisance and that part of the pleadings disclosing no cause of action is prejudicial and embarrassing, and may be proceeded upon under R.S.C. Ord. 25, r. 4, and R.S.C. Ord. 19, r. 27. It is not a matter of discretion. It is not right to call upon the defendant to justify a plea which discloses no cause of action.

We may deal with the law as we think it stands. I may refer to the case of *Vacher* v. *London Society of Compositors* (2), where this court, under an application under R.S.C. Ord. 25, r. 4, did order the pleadings to be struck out as disclosing no cause of action, the court

depending for its decision in that case upon the construction of the Trade Disputes Act, 1906.

In my opinion this appeal succeeds.

Romer, L.J.: I agree and have nothing to add.

Greene, L.J.: I agree.

Appeal allowed.

Solicitors: *Holmes, Son & Pott* (for appellant); *Burton, Yeates & Hart* (for respondent).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

PLUNKETT AND ANOTHER *v.* BARCLAYS BANK, LIMITED.

[KING'S BENCH DIVISION (du Parcq, J.), **March 12, 1936.**]

Bankers—Cheques—Dishonour—Clients account.

The plaintiff, in compliance with the Solicitors Act, 1933, and the Solicitors Accounts Rules, 1935, opened an account at the defendant bank into which he paid certain moneys for and on behalf of clients. A garnishee order *nisi* was obtained by a creditor of the plaintiff and served upon the defendants. The defendants applied the order to the plaintiff's client account. A cheque presented upon this account by a payee of the plaintiff was returned marked "Refer to drawer" :—

HELD : (i) the money standing to the credit of the client account was a debt due from the defendants to the plaintiff and the garnishee order *nisi* bound that debt in the defendants' hands.

(ii) in the circumstances the words "Refer to drawer" were no libel.

[EDITORIAL NOTE. This case raises an interesting question now that what was for long the practice of most solicitors has become a statutory obligation, that is that clients' moneys should be kept in a separate banking account. It is here decided that a garnishee order would extend to such client account and that a bank is justified in refusing to honour a cheque drawn upon it after such order had been made. It by no means follows because money is in the client account that it has not at some time since it was paid in become money to which the solicitor is absolutely entitled. It is quite possible that the client may say at some time, "You have so much to my credit standing in your client account and I owe you so much for costs. You had better take your costs out of that money." The suggestion, therefore, that the garnishee order should be specially drafted to meet such cases would appear to be the most reasonable solution of the difficulty.

FOR THE SOLICITORS ACT, 1933, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 26, p. 735.

AS TO WRONGFUL DISHONOUR OF CHEQUES, see HALSBURY, Hailsham Edn., Vol. 1, p. 827, para. 1348, and FOR CASES, see DIGEST, Vol. 3, pp. 217-223, Nos. 549-584.]

Cases referred to :

(1) *Roberts* v. *Death* (1881), 8 Q.B.D. 319 ; 21 Digest 629, *2131.*
(2) *Hancock* v. *Smith* (1889), 41 Ch. D. 456 ; 3 Digest 185, *364.*
(3) *Rogers* v. *Whiteley*, [1892] A.C. 118 ; 3 Digest 221, *569.*
(4) *Galbraith* v. *Grimshaw*, [1910] 1 K.B. 339, affd. [1910] A.C. 508 ; 21 Digest 618, *2058.*
(5) *The Leader* (1868), L.R. 2 A. & E. 314 ; 42 Digest 289, *3240.*
(6) *Gray* v. *Johnston* (1868), L.R. 3 H.L. 1 ; 3 Digest 222, *579.*
(7) *Flach* v. *London and South-Western Bank, Ltd.* (1915), 31 T.L.R. 334 ; 3 Digest 220, *567.*

ACTION for breach of contract and/or for negligence and/or for libel. The facts fully appear from the judgment.

E. G. Hemmerde, K.C., and *Neil Lawson*, for the plaintiffs.

W. N. Stable, K.C., and *George Bankes*, for the defendants.

DU PARCQ., J. : The plaintiffs in this action claimed damages against

the defendants for wrongfully dishonouring two cheques and for libel. The plaintiff, Donald William Plunkett, is a practising solicitor. In the summer of 1935 he began to practise under the style of William Mandeville & Co. On Aug. 23, 1935, two accounts were opened in his name at the Kingsway branch of the defendant bank. The first was headed "Donald William Plunkett, trading as William Mandeville & Co."; the second bore the same heading with the addition of the words "Clients account." The second was opened in compliance with the Solicitors Act, 1933, and the Solicitors Accounts Rules, 1935, made thereunder by the Council of the Law Society (S.R. & O., 1934, No. 718).

The plaintiff Addis, who is also a solicitor, was engaged by Mr. Plunkett as managing clerk. The bank was instructed, for reasons which I need not enter into, that all cheques drawn upon the two accounts were to be signed by Mr. Plunkett and also by Mr. Addis, the latter signing as cashier. The evidence of Mr. Rainer, the manager of the Kingsway branch, which I accept, and indeed the evidence of Mr. Plunkett, made it plain that neither of the accounts was opened as a joint account, and that Mr. Addis was not a creditor of the bank in respect of either of them. At the beginning of his final address Mr. Hemmerde, on behalf of the plaintiffs, frankly abandoned the contention that Mr. Addis was entitled to maintain this action. Mr. Hemmerde further invited an intimation from me that I was satisfied by the evidence that neither account was a joint account and having received that intimation did not address any further argument to me as to the first account. Moreover, Mr. Hemmerde agreed that so far as the first account was concerned, there was no answer to the defendants' plea of estoppel based upon the order of Langton, J., dated Oct. 8, 1935. It appears to me to be unnecessary, therefore, to review the evidence or to give any further reasons for my finding of fact upon that part of the case. So far as the cheque drawn on the first account is concerned the claim fails, and the plaintiff Addis has no cause of action against the defendants.

It remains for me to deal with Mr. Plunkett's claim in relation to the clients account. Hereafter in this judgment I shall refer to Mr. Plunkett as "the plaintiff."

The account was opened, as I have said, on Aug. 23, 1935, though nothing was then paid into it. On Sept. 7 the plaintiff paid into the account the sum of £48 5*s*. in cash. This money had been received from a client in order that it might be applied in payment of rent and solicitor's costs payable by the client to a third party. On Sept. 6 a cheque for £48 5*s*. was duly drawn by the plaintiff on the clients account; it was sent on that day with a covering letter to Mr. Nicholls, the solicitor acting for the person to whom the rent was payable, and was acknowledged by Mr. Nicholls on Monday, Sept. 9.

On Sept. 9 an *ex parte* application was made in the Probate Divorce

and Admiralty Division for the service of a garnishee order *nisi* upon the defendants in respect of debts owing or accruing due from the defendants to the plaintiff. The application was made at the instance of Carmen Plunkett, formerly the plaintiff's wife, who obtained a decree *nisi* for dissolution of the marriage against the plaintiff in Oct., 1934, which decree was made absolute in July, 1935. The plaintiff as respondent in the proceedings for divorce was still indebted to the petitioner for the sum of £150 17*s.* 9*d.* costs. A garnishee order *nisi* was made upon the petitioner's application and was served on the defendants. It was in the usual form, and ordered

> that all debts owing or accruing due from the garnishees to the respondent (the plaintiff in this action) not exceeding the sum of £150 17*s.* 9*d.* be attached to satisfy the amount due from the respondent to the petitioner, and further that the garnishee should attend before one of the registrars on Sept. 23, 1935, on an application that they should pay the debt due from them.

This order was served upon the defendants on the day on which it was made, and the manager of their Cheapside branch where the plaintiff had a small account at once wrote and informed the plaintiff of it. The manager of the Kingsway branch was not in London, but his chief assistant, Mr. Jackson, spoke to the plaintiff on the telephone on Sept. 10 and told him, as was the fact, that he had consulted the head office of the bank and that in the view of the bank the garnishee order would apply to both accounts at the Kingsway branch, so that no cheques drawn on the clients account would be honoured while the order remained in force. Mr. Addis replaced the plaintiff at the telephone and vigorously protested against this course being taken by the defendants, and later he renewed his protest to Mr. Tonkyn, an inspector at the head office. The defendants, however, maintained their attitude. Mr. Nicholls presented a cheque for £48 5*s.* for payment after the defendants had been served with the garnishee order. His signature as indorser was not easily legible, and the defendants at first temporised by marking the cheque "Endorsement requires confirmation." On Sept. 11 it was re-presented, and thereupon the defendants marked it "Refer to drawer" and returned it unpaid.

It is satisfactory to know that before the dishonoured cheque reached Mr. Nicholls, Mr. Addis, acting on the plaintiff's behalf, had paid him the sum of £48 5*s.*, and that the solicitors acting for the judgment creditor, on being informed of the facts, wrote a letter to the defendants, dated Sept. 13, expressing their willingness that the garnishee order *nisi* should not operate so far as the clients account was concerned.

The plaintiff complains that the defendants acted negligently and in breach of their contract with the plaintiff when they dishonoured the cheque, and that the words "Refer to drawer" were defamatory of him. The defence, put shortly, is that the moneys standing to the

credit of the clients account were due from the defendants to the plaintiff, and that service of the garnishee order *nisi* precluded them from paying that debt to the plaintiff. In the circumstances they say that the only course reasonably open to them was to mark the cheque "Refer to drawer."

The question at issue is clearly of importance not only to banks but to solicitors and their clients. It is well known that it has long been the practice of many, and I suppose of most solicitors, to pay moneys which they receive on behalf of their clients into a separate banking account or separate accounts, so that their own and their clients' moneys may be kept apart. The Solicitors Act, 1933, s. 1, empowered the Council of the Law Society to make rules as to the opening and keeping by solicitors of accounts at banks for clients' moneys.

The rules to which I have already referred were made in 1934, and came into operation on Jan. 1, 1935.

The Solicitors Act, 1933, s. 8, is as follows:

(1) Subject to the provisions of this section no bank shall, in connection with any transaction on any account of any solicitor kept with it or with any other bank (other than an account kept by a solicitor as trustee for a specified beneficiary) incur any liability or be under any obligation to make any enquiry or be deemed to have any knowledge of any right of any person to any money paid or credited to any such account which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or credited to it: Provided that nothing in this subsection shall relieve a bank from any liability or obligation under which it would be apart from this Act. (2) Notwithstanding anything in the preceding subsection, a bank at which a solicitor keeps an account for clients' moneys shall not, in respect of any liability of the solicitor to the bank, not being a liability in connection with that account, have or obtain any recourse or right, whether by way of set-off, counterclaim, charge, or otherwise, against moneys standing to the credit of that account: Provided that nothing in this subsection shall deprive a bank of any right existing at the time when the first rules made under this Act come into operation.

Rules 1 and 2 of the Solicitors Account Rules, 1935, provide for the keeping of a clients account by every solicitor, and rule 3 is in the following terms:

No money shall be paid into a client account other than:—(*a*) money held or received on account of a client; (*b*) such money belonging to the solicitor as may be necessary for the purpose of opening or maintaining the account; (*c*) money for replacement of any sum which may by mistake or accident have been drawn from the account in contravention of rule 4 of these Rules; (*d*) a cheque or draft received by the solicitor representing in part money belonging to the client and in part money due to the solicitor, when such cheque or draft has not been split as provided by rule 2 hereof.

I have found it necessary to consider carefully what effect sect. 8 of the Act may have upon the right and liabilities of the parties to this action. Sect. 8 clearly includes client accounts kept by solicitors within its ambit, and enacts that no bank shall in connection with such accounts

be deemed to have any knowledge of any right of any person to any money paid or credited to any such account which it would be deemed to have in the case of an account kept by a person entitled absolutely to all the moneys paid or credited to it. This seems to me to be another way of saying that the bank in the circumstances mentioned shall not be deemed to have any knowledge which it has not in fact as to such rights. Nobody can be deemed to have knowledge of rights of third persons to money in a customer's account when the customer is absolutely entitled to all the money in it. Equally, I think the bank is relieved by the section from any obligation to make any enquiry as to the rights of third persons in respect of a client account. All this, however, is subject to the proviso which is, of course, important. The bank is not relieved by the Act from any obligation under which it would be apart from the Act. Further, it is to be observed that the section does not say that the bank is to be deemed to be ignorant of facts which are within its knowledge or that it is to be deemed ignorant of the law.

In my judgment the defendants were in the same position, for the purposes of this case, in which they would have been before the passing of the Solicitors Act, 1933, and the coming into operation of the Statutory Rules if the client account had been kept voluntarily by a solicitor who, to their knowledge, guided himself by self-imposed rules having the same effect as those which are now statutory. I cannot doubt, and I think I am bound to assume, that the officials at the defendants' head office were acquainted with the provisions of an Act which so nearly affected the bank's interests and of the rules made thereunder.

If the defendants had that knowledge in fact, it needed no enquiry on their part to satisfy them that the money in the account was not within (*b*), (*c*) or (*d*). The defendants had not required the payment of any sum for the purpose of opening the account and nothing had been drawn from the account. The sum of £48 5*s*. which was the only money paid into the account had been paid into the bank in the shape of notes and coin. It followed that unless the plaintiff had broken the law, which ought not to be assumed, the sum of £48 5s. was "money held or received on account of a client" within (*a*). It was accordingly trust money as is the money recovered by a judgment creditor in an action which he brings as trustee for another person (see *Roberts* v. *Death* (1)), or the money paid by a stock-broker into an account into which he pays nothing but moneys received on behalf of clients (see *Hancock* v. *Smith* (2)).

I must, therefore, deal with this case on the footing that the defendants knew that the sum of £48 5*s*. consisted of trust money though they did not know and were under no obligation to enquire what person or persons had an equitable claim to it. It is not in dispute that in the course of his telephone conversation with the inspector at the bank's

head office on Sept. 10, Mr. Addis offered to produce proof that the moneys standing to the credit of " client account " were in fact the moneys of a client.

The law and rules of practice relating to the attachment of debts are contained in R.S.C. Ord. 45. Rule 1 provides for the making of an order *nisi* such as was made in this case. R.S.C. Ord. 45, r. 2, is as follows :

> Service of an order that debts, due or accruing to a debtor liable under a judgment or order, shall be attached, or notice thereof to the garnishee, in such manner as the court or judge shall direct, shall bind such debts in his hands.

If money standing to the credit of the client account was in fact a debt owing from the defendants to the plaintiff, it cannot be doubted that the defendants were entitled to refuse to pay that money to the plaintiff or to his order after the service of the garnishee order *nisi*. It would, in fact, have been wrong to pay it to the plaintiff (see *Rogers* v. *Whiteley* (3), especially per Lord Halsbury, L.C., at page 121 and *Galbraith* v. *Grimshaw* (4), per Farwell, L.J., at page 343). Service of the order *nisi* and I now quote Farwell, L.J. :

> does not, it is true, operate as a transfer of the property in the debt, but it is an equitable charge on it, and the garnishee cannot pay the debt to any one but the garnishor without incurring the risk of having to pay it over again to the creditor.

R.S.C. Ord. 45, r. 5, provides, though imperfectly, for a case in which the debt sought to be attached belongs to some third person, or some third person has a lien or charge on it. I say " imperfectly " because the rule deals only with cases in which the garnishee suggests that a third person is beneficially interested. It was held, however, in *Roberts* v. *Death* (1) that the court ought not to make the order absolute if it was shown that there was reasonable ground for thinking that the money due to the execution creditor was trust money, even though the suggestion did not come from the garnishee.

The importance of R.S.C. Ord. 45, r. 5, for the present purpose is that it contemplates a case where, as here, the garnishee knows that his creditor (the judgment debtor) is a trustee, and that the debt " belongs " to the *cestui que trust*. In such a case there is no doubt that the garnishee is under a duty to inform the court of the claim of the person beneficially entitled to the money (see *The Leader* (5)). But unless the words of R.S.C. Ord. 45, r. 1, clearly showed that the garnishee was to treat money due by him to a person as trustee for another as money due not to the trustee but to the *cestui que trust*, I should infer from the language of R.S.C. Ord. 45, r. 5, that the garnishee was not entitled to pay the debt either to the *cestui que trust* or to the trustee for the benefit of the *cestui que trust* after notice of service of the order *nisi*.

The material words of R.S.C. Ord. 45, r. 1, are: All debts owing or accruing from such third person

I find it impossible to say that money paid into a client account kept with a bank in the name of a solicitor is not a debt owing from the banker to the solicitor. It cannot be denied that the relation of debtor and creditor subsists between the bank and the solicitor. The solicitor may at any time draw a cheque upon the account and the bank must honour it. As a general rule, the bank is not entitled to set up a supposed *jus tertii* against the customer (see per Lord Westbury, *Gray* v. *Johnston* (6), at page 14). The service of the order *nisi* gives the judgment creditor, in the words of FARWELL, L.J., an equitable charge upon the debt, and I cannot think that it was ever intended that the garnishee should be compelled to adjudicate upon conflicting equities, even though the problem presented by the conflict might appear to the lawyer to be a simple one.

For these reasons I am of opinion that the defendants were right in thinking that the money due from them on the client account was a debt due to the plaintiff, and that the garnishee order *nisi* bound that debt in their hands.

It was said that if this view were right, the consequences would sometimes be serious. Some time must elapse before the making of the garnishee order *nisi* and the hearing of the application for the payment of the debt to the judgment creditor. It might well happen in the case of a solicitor who was a judgment debtor that he was not in a position to find the money necessary to satisfy the claim of a client out of his own pocket. These considerations are not strictly relevant to the question of law which I have had to decide. I think it right to say, however, that apart from the duty of the garnishee to inform the court of the nature of the account, it is the manifest duty of a bank, as the defendants in this case recognised, to inform the customer at once of the service of the order and of the fact that cheques on the account cannot be honoured. Further, I think it will be well that judgment creditors applying for garnishee orders *nisi* should realise that they may incur costs unnecessarily if the order is so drawn as to affect a client account. It is always open to the creditor to ask the court to restrict the terms of a garnishee order *nisi* so that such an account will not be affected by it. I have no right to lay down any rule in the matter, and I do not seek to do so, but the court may sometimes think it proper in future to call the attention of the judgment creditor to this aspect of the matter when an order is sought against a practising solicitor. There is no reason why the common form of the order should not be modified in a proper case.

I have only to add that in the circumstances of this case the words "Refer to drawer" were, in my opinion, no libel. I respectfully adopt

the language of Scrutton, J., as he then was, in *Flach* v. *London and South-Western Bank Ltd.* (7), at page 336. There the learned judge said :

> The words " refer to drawer " in his opinion, in their ordinary meaning, amounted to a statement by the bank, " We are not paying ; go back to the drawer and ask why," or else, " go back to the drawer and ask him to pay." In the view he took of the case the bank were justified in not paying . . . and he did not think that it was possible to extract a libellous meaning from what had been said by the bank.

It is unnecessary for me to decide or express any opinion upon the further point taken by Mr. Stable, first that in any event the plaintiff would be entitled to nominal damages only for the dishonouring of the cheque ; secondly, that the alleged libel was published on a privileged occasion. It is perhaps proper to add, however, that there was admittedly no evidence of malice on the part of the defendants.

Solicitors : *William Mandeville & Co.* (for the plaintiffs) ; *Powell, Burt & Lamaison* (for the defendants).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

JONES *v.* SMITH.

[COURT OF APPEAL (Slesser, Greene and Scott, L.JJ.), **March 30. 1936.**]

Master and servant—Workmen's compensation—Approbation of award by accepting costs.

An injured workman was awarded a weekly payment by way of compensation, and costs. The costs were duly taxed and paid. The workman then sought to appeal against the *quantum* of the award :—

HELD : the award was indivisible and, having approbated it by accepting costs, the workman could not then reprobate it by appealing against the *quantum*.

Per GREENE, L.J. : The workman approbated the award as soon as he proceeded to taxation.

[EDITORIAL NOTE. There is a line of authorities that show clearly that where a workman receives payment of compensation under an award, he thereby approbates the award and cannot afterwards appeal. The question here is a simple extension of this : Are the costs of the arbitration an indivisible part of the award, so that acceptance of them by the workman will similarly be an approbation of the award and a bar to an appeal ? It is here held that such is the case and it is further suggested that the workman cannot even take a step in the taxation of such costs without approbating the award.

AS TO APPEALS IN WORKMEN'S COMPENSATION CASES, see HALSBURY, 1st Edn., Vol. 20, p. 238, para. 565, and Supp. ; and FOR THE CASES, see DIGEST, Vol. 34, pp. 479, 480, Nos. 3947-3954.]

Cases referred to :

(1) *Johnson* v. *Newton Fire Extinguisher Co.*, [1913] 2 K.B. 111 ; 6 B.W.C.C. 202 ; 34 Digest 479, *3947*.

(2) *Stroewer* v. *Aerogen Gas Co.* (1913), 6 B.W.C.C. 576 ; 34 Digest 479, *3948*.

(3) *Josey* v. *Vincent* (1916), 9 B.W.C.C. 474 ; 34 Digest 479, *3949*.

(4) *Jones* v. *Winder* (1914), 7 B.W.C.C. 204 ; 34 Digest 480, *3951*.

(5) *Ward* v. *Cundall* (1917), 10 B.W.C.C. 611 ; 34 Digest 480, *3950*.

(6) *Harris* v. *Minister of Munitions* (1920), 13 B.W.C.C. 324 ; 34 Digest 480, *3953*.

(7) *Reeves* v. *Smith (S.) and Sons* (1922), 15 B.W.C.C. 190 ; 34 Digest 480, *3954*.

(8) *Moore* v. *Cunard S.S. Co.* (1935), 28 B.W.C.C. 162 ; Digest Supp.

APPEAL by a workman from an award made on Dec. 24, 1933, by His Honour JUDGE O. G. MORRIS in the County Court of Carnarvon.

A workman injured his hand at work and received compensation at £1 3*s*. 6*d*. a week and later at 7*s*. 7*d*. a week. The employers then terminated payment and the workman applied for arbitration. The learned judge awarded him 3*s*. 1*d*. per week compensation instead of the 7*s*. 7*d*. which he asked, with costs to be taxed by the registrar under Scale "B." The costs were taxed and allowed, and certified by the registrar, whereupon the workman's solicitor requested payment, and the amount was duly paid. The workman appealed against the *quantum* of the award, on the ground that the compensation should be 7*s*. 7*d*. per week.

W. Shakespeare and *J. Jones Roberts* for the appellant workman.

F. W. Beney for the respondent employers.

Beney took the preliminary objection, that by accepting the taxed costs the workman had in part enforced the award; he could not therefore attack another part of it by appeal. The award is indivisible: Willis on Workmen's Compensation, pp. 584, 585; *Johnson* v. *Newton Fire Extinguisher Co.* (1).

Shakespeare: The cases are no longer binding: *Moore* v. *Cunard S.S. Co.* (8). Costs do not enter into the award, so their acceptance does not amount to approbation.

Slesser, L.J.: In this case a preliminary objection has been taken on behalf of the respondents, the employers, by Mr. Beney, and that preliminary objection, in the opinion of the court, succeeds. On the merits of the appeal, we need now express no opinion. On Dec. 24, 1935, the learned judge made his award, which consists of two parts: the first part orders that the respondents pay to the applicant the weekly sum of 3*s.* 1*d.* as compensation from May 27, 1935, and the second part orders that the respondents

> pay to the said Charles Burn Jones the sum of £4 6*s.* 4*d.*, being the amount of weekly payments calculated from May 27 and thereafter pay the sum of 3*s.* 1*d.*,

and there follows this third provision:

> I order that the said Sir Michael Duff Assheton Smith do pay to the registrar of this court, for the use of the applicant, his costs of and incidental to this arbitration, such costs, in default of agreement between the parties as to the amount thereof, to be taxed by the registrar under column "B" of the scales of costs in use in the county courts, and to be paid by the said Sir Michael Duff Assheton Smith to the registrar within fourteen days.

That order, in my opinion, is one and indivisible and can only be treated upon that basis. It is in part an award as to payment; it is in part an award as to costs to be paid by the employer, who had failed to this extent: that he had said that this man was able to earn his pre-accident wages and that he should receive no compensation at all.

The other matter which has to be considered is this: an affidavit was read before this court by one Thomas Norman Gilbert, who is a partner in the firm of Barlow, Lyde & Gilbert, acting for the respondents; and he says—and it is not disputed—that as a result of the award, correspondence followed between the respondents' solicitors and the applicant's solicitors with regard to the taxation of costs, and that on Jan. 3 the costs were taxed and allowed at £26 7*s.* 5*d.*, and the registrar in due course gave his certificate for that sum. On Jan. 11, 1936, a letter was sent to the respondents' solicitors stating that a voucher for counsel's fees had been sent to the registrar and requesting a cheque in payment. This letter was acknowledged by a letter dated Jan. 14, 1936, and the said sum was paid on Jan. 24, 1936.

There is no dispute about those facts, and therefore it appears that, so far as that part of the award which ordered costs was concerned, the

appellant here received the compensation of those costs by accepting through his solicitor a cheque for the taxed costs on Jan. 24, 1936. Now in those circumstances it is argued by Mr. Beney that this appeal is not competent. He says that the appellant here cannot approbate the award and at the same time appeal from it, and that because he has accepted the costs payable under the award he has approbated the award and is precluded from appealing. In my opinion the matter is undoubtedly concluded by authority. The leading case—if I may use the expression to indicate the case which started this doctrine and first raised it in this court—is the case of *Johnson* v. *Newton Fire Extinguisher Co.* (1). In that case :

> A workman refused an offer of compensation, and at the hearing the county court judge awarded the amount offered and order the costs incurred by the employers subsequent to the offer to be deducted from the compensation at the rate of 5*s*. a week. The costs were taxed, and the workman received the compensation, less the 5*s*., and yet sought to appeal against the validity of such order as to costs. *Held*, the award was indivisible, and this was an attempt both to approbate and reprobate it.

LORD COZENS-HARDY, M.R., at page 204, after setting out the facts, says this with regard to the argument that it is possible to set off costs against the main award :

> He has acted upon it. He cannot take the benefit of the award and at the same time say that there is no jurisdiction. He must either approbate the award or reprobate it. It is admitted that the applicant's costs have been taxed. It is admitted he has received compensation under the award, that is to say, 12*s* 8*d*. a week, less 5*s*.—

the 5*s*. being appropriated to the costs the deduction of which was in dispute—

> That being so, the award being one entire award, it is impossible, I think, for a workman to be allowed to say that one particular portion of the award is bad, and at the same time to stick to the award so far as he gets any benefit.

I emphasise these last words " so far as he gets any benefit," because in all the cases which were cited to us—and there have been a good many dealing with this case—*Stroewer* v. *Aerogen Gas Co.* (2), *Josey* v. *Vincent* (3), *Jones* v. *Winder* (4), *Ward* v. *Cundall* (5), *Harris* v. *Minister of Munitions* (6), and one later, the case of *Reeves* v. *S. Smith & Sons* (7) —the benefit had been taken by the persons who had approbated the award, and, having taken that benefit, it was held that they were precluded from appealing.

It is enough for my purpose, having cited the first case in this long chain of authority, to mention *Reeves* v. *S. Smith & Sons* (7), which is as recent as 1922. There :

A workman was injured by accident in the course of his employment. He claimed compensation and the county court judge made an award in his favour on the basis of partial incapacity. There was some delay in drawing up the award, but on the day following that on which the award was made (but before it was drawn up) the employers sent the workman a cheque covering five weeks' payments under the award. They asked for a receipt and informed the workman that they would send him a cheque every four weeks in future. The cheque was cashed and the workman's solicitor said that he would send a formal receipt after seeing the award. In due course the employers sent a second cheque, covering four weeks' payments under the award. In the meantime a notice of appeal against the award on the ground of inadequacy was served on the employers, and the workman's solicitor returned the employers' second cheque together with a cheque for the amount of their first cheque, which had been cashed. *Held*, that the workman had approbated the award by the acceptance of the first payment and that the return of the money by the workman's solicitor came too late.

Lord Sterndale, M.R., says simply, at page 192 :

> The workman had already approbated the award by accepting the first payment,

and Scrutton, L.J., says :

> On the decided cases, it is clear that if it is desired to appeal against an award there must be no acceptance of any money under it.

Mr. Shakespeare has cited to us a case recently decided in the House of Lords : *Moore* v. *Cunard Steamship Co.* (8), which, he says, throws doubt on the authority of the long chain of decisions in this court to which I have referred. In that case the arbitrator had come to the conclusion on the evidence that the man who was claiming compensation had fully recovered, and declined therefore to make an award in his favour. The man then appealed to this court, and this court took the view that there was evidence for the county court judge to have held that there was partial incapacity. The Court of Appeal remitted the case to the county court, and the judge thereafter made an award of a weekly sum of 10*s.* as compensation. That 10*s.* the employers duly paid. After the award had been made, and the employers had paid for four months in obedience to that amended award of the county court judge, they gave notice of appeal to the House of Lords from the decision of the Court of Appeal. The House of Lords decided that the Court of Appeal was wrong, and that there was evidence on which the learned arbitrator originally could find that this workman was fully recovered from the effects of the accident ; therefore they allowed the appeal from this court.

Mr. Shakespeare argues that that could not have been done on the doctrine of approbation as it is stated in the cases to which I have referred. If it had been recognised by the learned Lords they would have had to hold that the employers, by paying that 10*s.* a week under the order of the arbitrator as instructed on remission by this court, precluded themselves from appealing to the House of Lords. In my view no such conclusion is derivable from that case, and for two reasons.

First of all, what they are there appealing from was not the award at all, but the order of this court remitting the matter to the arbitrator to make an amended award, and therefore what was impeached was not the award, but the decision of this court. Secondly (and this seems to me to be even more fatal to Mr. Shakespeare's point than the first), the decisions which have precluded a person from appealing are in cases where that person has taken the benefit of an award. In *Moore* v. *Cunard Steamship Co.* (8), so far from the employers taking any benefit from the amended award of the county court judge, at most they performed a duty under the award, regarding—for the time being at any rate—the Court of Appeal's decision as valid. Regarding their obligations, and possibly having regard to penalties which might fall on them if they did not pay that award, they performed the duty of paying 10*s.* to the workman and in no sense received benefit. If anything, the award carried an obligation under it. Therefore it seems to me that the case of *Moore* v. *Cunard Steamship Co.* (8) affords no assistance to the determination of this case.

I think we must point out, as has been said on previous occasions, that this rule may cause great difficulties to an appellant in having an award temporarily obeyed on which he is going to appeal—by "temporarily," I mean if he is minded to have it questioned in another court—and also great difficulties in regard to accepting the costs. The decisions, however, seem to me conclusive and binding on us; such things may be done with a certain amount of peril, and whatever the case may be where a workman has taken pains to protect himself—if he can protect himself by proper action—at any rate, where he takes the money *simpliciter*, as in the present case, which is all we have to consider, it is impossible to say he has not approbated the award and so precluded himself from questioning its validity.

GREENE, L.J.: I agree. The principle that a party to an award cannot at the same time approbate and reprobate is too well settled for us in any way to attempt to disturb it. We can only administer the law as we find it, although it seems clear—as indeed has been said in some cases—that the rule may result in hardship and inconvenience.

There are only two matters on which I wish to say a word. The first is this. Mr. Shakespeare pointed out, correctly, that the notice of appeal was served on Jan. 14, whereas the payment of the taxed costs took place on the 24th. The money was not returned, and, quite apart from the question of the receipt of the money the appellant in my opinion approbated the award within the meaning of the rule when he proceeded to taxation under it, and the fact that he might have refused even then to accept the payment for costs if he changed his mind, and was minded to appeal, would not have prevented that taxation under the award being an act of approbation. After all, approbation is no more than this :

it is conduct which shows beyond doubt the intention of the person acting to abide by the award, and in this case the appellant quite clearly manifested such intention in my opinion when he proceeded to the taxation of his costs.

The other matter is this. Mr. Shakespeare endeavoured to distinguish this case from the other authorities which have been cited to us by arguing that the costs in this case, at any rate, were not in dispute, and that the employers would, whatever the result of the appeal, be bound to pay them. That argument appears to me to be quite inadmissible, and I need only refer to the case of *Josey* v. *Vincent* (3). That was a case where a workman had been given compensation but the county court judge made no order as to costs. The workman received the compensation but appealed on the question of costs. That was held to be an attempt to approbate and reprobate the award. In that case, whatever effect the appeal had upon the matter of costs, the workman was entitled to keep the compensation awarded; just as in the present case, whatever the result of the appeal on the question of *quantum* of compensation, the workman would be entitled to get his costs of the arbitration. In the case of *Josey* v. *Vincent* (3), it was held that the rule applied and that, although the appeal had no relation to the particular benefit which the workman had received, he could not at one and the same time approbate and reprobate. In my judgment the principles laid down in the authorities, and on this particular point particularly in the case of *Josey* v. *Vincent* (3), make it quite impossible to accept that argument. I agree that the appeal should be dismissed, and with costs.

Scott, L.J.: I agree with both judgments.

Appeal dismissed with costs. Leave granted to appeal to the House of Lords.

Solicitors: *Pattinson & Brewer*, for *W. Elwyn E. Jones*, Bangor (for the appellant); *Barlow, Lyde & Gilbert*, for *R. Vincent Johnson*, Llandudno (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

Re LEIGHTON'S CONVEYANCE; *Re* THE LAND REGISTRATION ACT, 1925.

[CHANCERY DIVISION (Luxmoore, J.), **March 24, 25, 1936.**]

Real property—Registered land—Rectification of regisier—Entry procured by fraud—Land Registration Act, 1925 (c. 21), *s.* 82 (1) (*d*).

A daughter without her mother's knowledge arranged for the sale of certain registered land from the mother to herself. Without explaining the true nature of the document, the daughter secured the execution of the necessary transfer by her mother and her own registration as owner with an absolute title. The daughter subsequently created charges upon the property, the chargees being ignorant of the fraud upon the mother, and giving full consideration for their charges:—

HELD: the mother was entitled, under Land Registration Act, 1925, s. 82, to rectification of the register by striking out the daughter's name and inserting the mother's name as owner with an absolute title. There was, however, no ground for any rectification of the charges register.

[**EDITORIAL NOTE.** The main point in this case is whether the register ought to be rectified under the power given to the court by the Land Registration Act, 1925, s. 82 (1) (*d*). This paragraph gives the court power to rectify the register where it is satisfied that any entry in the register has been obtained by fraud. This only requires that the court shall be satisfied as to the fraud and does not in itself require that the case shall be brought within the rules of law for avoidance of deeds as *non est factum* or for rescission on the ground of misrepresentation or rectification on the ground of mistake. The principles upon which the court has acted in respect of deeds of private conveyancing would appear only to affect the extent to which the register should be rectified. The result in this case was that certain charges for valuable consideration were allowed to remain upon the register, although the person who received the money had been fraudulent.

AS TO RECTIFICATION OF THE REGISTER, see HALSBURY, Hailsham Edn., Vol. 19, pp. 460, 461, para. 975; FOR LAND REGISTRATION ACT, 1925, s. 82, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 15, pp. 485, 486.]

Cases referred to:

(1) *National Provincial Bank of England* v. *Jackson* (1886), 33 Ch. D. 1; 17 Digest 202, *133*.
(2) *Bagot* v. *Chapman*, [1907] 2 Ch. 222; 17 Digest 35, *504*.
(3) *Foster* v. *Mackinnon* (1869), L.R. 4 C.P. 704; 17 Digest 230, *449*.
(4) *King* v. *Smith*, [1900] 2 Ch. 425; 40 Digest 294, *2537*.

ADJOURNED SUMMONS, asking for rectification under Land Registration Act, 1925, s. 82.

Miss Leighton, the daughter of the applicant, desired to acquire the freehold of 167, Camden Road, London, that her mother might live there. The daughter was a person of varied activities, including carrying on an inn or roadhouse and the proprietorship of a business manufacturing hair preparations, by reason of which, in 1926, she became bankrupt. In Jan., 1928, Miss Leighton was the owner of a leasehold interest in the property and the freehold of the reversion thereon was

vested in certain trustees. A sale was arranged whereby both the freehold and leasehold interests were transferred to the applicant subject to a mortgage of £1,200 being the purchase money, and the applicant was registered as absolute owner.

In 1928 the daughter set about getting the property transferred back to herself, without the knowledge of the applicant. In July, 1928, she called upon Messrs. Macdonald & Stacey, the solicitors who had acted in the purchase, and requested them to arrange for the sale of the property from the applicant to Mrs. Bergin. This she did in the name of Margery Leighton, and Mr. Mant, the partner with whom she dealt, was unaware of her identity with Mrs. Ethel Bergin. Mrs. Ethel Bergin was, in fact, the same person as Margery Leighton. As Mrs. Bergin she also went to another firm of solicitors, Messrs. Forsyte Kerman & Phillips, and arranged for the purchase of the property by her as Mrs. Bergin. The clerk with whom she dealt in that firm was not now traceable. The daughter produced two receipts for sums of £100 and £150, part of the purchase money, to Messrs. Macdonald & Stacey, and signed K. Priestman, which is the name by which the applicant was more commonly known. The applicant had no recollection of signing these receipts, nor did she in fact receive these or any other sums of money. She signed many documents at her daughter's request, and it was represented to her that they were of no consequence, except in the case of the mortgage, which was read over to her by Miss Elsie Martin, a clerk in the office of Messrs. Macdonald & Stacey. Her pass book of that period showed that she received no payments of any sums of money under that purchase by Mrs. Bergin.

On July 18, 1928, the contract of sale was signed, in similar circumstances, and the witness to it was untraceable. All correspondence in the matter was directed to and dealt with exclusively by the daughter.

On July 30, 1928, the daughter called again on Messrs. Macdonald & Stacey and saw Mr. Mant, who recalled the interview. She then gave instructions for the preparation of her will, in the name of Claud Eflic Margery Bergin. Mr. Mant then realised for the first time that Miss Leighton and Mrs. Bergin were one and the same person, and he thereupon asked her if her mother knew of the transaction on foot. The daughter replied with an assurance that he could rest satisfied with his letter of authority. This letter has now been lost sight of and the applicant has no recollection of ever signing such a letter of authority, but the solicitors were content to act upon it in good faith. On Aug. 2, 1928, the form of transfer was sent to the applicant, but she has no recollection of signing it. In fact, it was signed at luncheon at Shoolbreds' restaurant, and the witness was a waitress who was unable to recall the occasion.

On Aug. 9, 1928, the daughter, Mrs. Bergin, arranged for the raising

of two advances on mortgage through Mr. Kerman, of Messrs. Forsythe, Kerman & Phillips, for the sums of £1,500 and £100 respectively. Out of these moneys the mortgage for £1,200 was repaid. On Aug. 11, 1928, Messrs. Macdonald & Stacey sent to the applicant a form of completion which showed the purchase money to be dealt with as follows; The price was £2,400, £250 of which was paid as a deposit. A further £1,600 was to be paid on completion and for the balance of £550 the purchaser was to give the vendor a promissory note. In fact, a cheque for £200 was received by the daughter and not by the applicant. Nor did the applicant ever receive the said promissory note for £550. On Mar. 5, 1929, there was a further charge for £250 in favour of Frederick Thomas Baker, one of the respondent chargees, and on Mar. 7, the £100 was repaid to Mr. Kerman. On Aug. 8, 1929, the other £1,500 was also repaid to Mr. Kerman.

On Sept. 3, 1929, a charge for £1,500 was negotiated with the respondent, Mrs. Massingham, and Baker's charge was postponed to hers. On May 6, 1933, a further charge was executed in favour of the respondents, Messrs. M. B. Foster & Sons, for all sums owing, amounting to £467 7*s*. 9*d*. On Mar. 29, 1935, the daughter died a bankrupt, and on May 3, an order was made for the administration of her estate in bankruptcy, followed by the resolution appointing her trustee in bankruptcy, one of the respondents to this application, dated May 13, 1935. These proceedings were commenced after the discovery by the applicant of the various dealings by the deceased daughter.

Eric V. E. White, for the applicant, Mrs. Wardman.

F. K. Archer, K.C., and *Donald Cohen*, for the respondent, Mrs. Massingham, one of the chargees.

Roger Turnbull, for the second respondent, Frederick Thomas Baker.

G. P. Slade, for the respondent, the trustee in bankruptcy of Mrs. Ethel Bergin, deceased.

J. V. Nesbitt, for the respondents, M. B. Foster & Sons.

White: The relevant sections of the Land Registration Act, 1925, are:

> Sect. 82. (1) The register may be rectified pursuant to an order of the court or by the registrar, subject to an appeal to the court, in any of the following cases, but subject to the provisions of this section:— . . . .
>
> (*d*) Where the court or the registrar is satisfied that any entry in the register has been obtained by fraud.
>
> (2) The register may be rectified under this section, notwithstanding that the rectification may affect any estates, rights, charges, or interests acquired or protected by registration, or by any entry on the register, or otherwise.
>
> (3) The register shall not be rectified, except for the purpose of giving effect to an overriding interest, so as to affect the title of the proprietor who is in possession. . . . .
>
> (*b*) unless the immediate disposition to him was void, or the disposition to any

person through whom he claims otherwise than for valuable consideration was void; or

(c) unless, for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him.

The deed was not ours. In all the cases where the plea of *non est factum* was not accepted by the court the party executing the document knew it was a deed affecting his property which is a circumstance not present here.

In *National Provincial Bank* v. *Jackson* (1) the learned Lord Justice pointed out that the sisters knew they were dealing with their property; and see *Bagot* v. *Chapman* (2), Swinfen-Eady, J., at page 225. The husband there represented the document to be a power of attorney enabling him to raise money at some future time, whereas in fact it was a mortgage of the wife's reversionary interest. The present case is very close.

Luxmoore, J.: There is no active misrepresentation. You must prove affirmatively it is not your deed (*Foster* v. *Mackinnon* (3)). She has said here that she would have signed anything, which amounts to negligence.

White: In *King* v. *Smith* (4) the man was accustomed to dealing with his solicitors. Mrs. Wardman may have known she was doing something, but she did not know what she was doing in the technical sense. Alternatively, the document is not void, but voidable. The court can avoid it.

The second part of my case must be a claim for the equity of redemption, and to pray an alteration of the register and a vesting of the equity of redemption in Mrs. Wardman.

Slade: Even against me the applicant has not proved her case. I am the trustee who acts through the daughter and also to protect these chargees for valuable consideration. I cannot resist an order to alter the Register, but there will be no alteration of the Charges Register. The result is that Mrs. Wardman will become the proprietor subject to the charges.

Cohen, for the respondent, Mrs. Massingham.

Luxmoore, J.: This is an application by a lady whose name is Mrs. Amelia Jane Wardman, but who is more usually known as Mrs. Kathlyn Priestman, which was the name which she used when she was on the stage. The proceedings were started by an originating summons and are brought under the Land Registration Act, 1925, s. 82, and they ask for rectification of the Register with regard to certain registered land, namely a house known as No. 167, Camden Road, London. The property is registered under the number 269716, and on the Register the name of Mrs. Ethel Bergin appears as the proprietor with an absolute title. The applicant also asks that the Register be rectified by removing from the

Charges Register three registered charges, which are numbered 13705/29, 50704/29 and 30864/33 respectively. The grounds upon which rectification is sought is that the property was that of Mrs. Wardman, and the registration of Mrs. Bergin on Aug. 31, 1928, was obtained in circumstances which entitle Mrs. Wardman to say that the deed which purported to convey the property from herself to Mrs. Bergin was not her deed. The case as it was originally framed alleged that the signature upon that deed was in fact a forgery, but Mr. White, who appeared for the applicant, who is suing as a poor person under the poor persons rules, has informed the court, quite properly, that it would be impossible on the evidence to proceed with the suggestion of forgery. He asked leave to amend his points of claim which he had submitted on behalf of the applicant by alleging that the signature was obtained by fraudulent misrepresentation and undue influence, and by pleading that the deed in question was not the deed of Mrs. Wardman on the footing of the cases upon the doctrine of what is known as *non est factum*. I gave Mr. White leave to amend in that manner and the application was stood over so that the various parties might have an opportunity of dealing with the amendment. At the hearing, Mr. Archer, for one of the respondents, a chargee, pointed out that the amendment as it stood did not support a plea of *non est factum*, and at Mr. White's request allowed him a further amendment to support that plea.

It is not necessary for me to go into the facts which led to the original vesting of the property in Mrs. Wardman. When the freehold was purchased the property was put in Mrs. Wardman's name in circumstances which made her the owner. She undoubtedly executed a document which vested the property in the name of Mrs. Bergin, but there can also be no doubt that Mrs. Bergin adopted a course of conduct which was wholly improper. She went to one firm of solicitors, supposedly on behalf of her mother, and represented that her mother was intending to sell the property. To them she was known under the name of Margery Leighton. At the same time, as Mrs. Bergin, she instructed another firm in connection with that purchase and a series of charges were negotiated and incurred in order to carry out the transaction, and she was able to raise further sums than she might have been able to do if the property had remained in her mother's name. These are the documents with reference to which Mrs. Wardman in the first instance alleged forgery. Mrs. Wardman in her points of claim has alleged that she was induced to execute these documents by reason of the fraudulent misrepresentation of Mrs. Bergin, and the particulars are that on a date which the applicant was unable to specify Mrs. Bergin falsely represented to the applicant that the said transfer was a document dealing with the affairs of a business of which Mrs. Bergin was the proprietor, and that Mrs. Bergin thereby induced the applicant to sign the said

transfer, and it was not the intention of applicant by signing the said transfer to deal with or in any way affect her title to the said premises, and she did not know that the said document was a transfer or a document of any such kind.

The applicant was then aged 62. I have seen her in the box and I have no doubt that she relied entirely on her daughter and was ready and willing to do whatever she wanted her to do or to sign any document which she requested her to sign without making any inquiry about it whatever. There is no doubt on the evidence that there was no active representation that the document would have any particular effect. I am satisfied from her evidence that nothing was said at all. She says that she does not remember the actual signature, but she always signed any document which she was asked to sign. As far as this matter was concerned, she had no intention of parting with her property and would not have signed if she had known that was the effect of the document. She simply did not take the trouble to read it or to inquire its contents, and that does not give the effect of a representation.

The law is quite plain in cases of this kind. If a party who executes a document can read but does not do so, it is good even if contrary to their mind. But if it is read falsely or its contents falsely declared and then signed, the deed is not his deed. The principle is found in Shepherd's Touchstone 56, and I referred to the setting out of it in Norton on Deeds at p. 4, and to the judgment of Cotton, L.J., in *National Provincial Bank of England* v. *Jackson* (1):

> Now the rule of law is that if a person who seals and delivers a deed is misled by the mis-statements or misrepresentations of the persons procuring the execution of the deeds, so that he does not know what is the instrument to which he puts his hand, the deed is not his deed at all, because he was neither minded nor intended to sign a document of that character or class, as, for instance, a release while intending to execute a lease. Such a deed is void.

He goes on to deal with that particular case and says :

> But I cannot come to that conclusion here. The defendants trusted Jackson both as their brother and solicitor, and cannot be said to have been guilty of negligence in so doing. On the evidence it is clear that nothing was said to mislead them as to the nature of the instrument they were executing: It is doubtful how far they understood the nature of the deeds, but it is in my opinion clear upon the evidence that they knew that the deeds dealt in some way with their houses. This contention therefore fails.

The facts of the present case seem to me to come very nearly within the passage which I have just read. I am satisfied that Mrs. Wardman completely trusted her daughter. She did not read any of the documents. There is little doubt that she had no understanding of the nature of the documents, but I am equally satisfied that she knew she was doing *some*thing, and if she had made inquiries she would have found out that it had to do with No. 167, Camden Road. She made no such inquiries,

and it follows with regard to the chargees who have acted on the faith of the document executed by Mrs. Wardman that she cannot against them aver that the deed was not hers, or that a misrepresentation was made which brought about its execution. I am satisfied that there are no grounds on which I can say that these charges are bad, but with regard to the equity of redemption I am satisfied on the evidence that what Mrs. Wardman did was at the request of and in reliance on her daughter, and under her influence. The daughter is now dead and her estate is being administered in bankruptcy. It follows that the conveyance to Mrs. Bergin can have no effect as against Mrs. Wardman, and she is still entitled to the equity of redemption in the property. The proper order in the circumstances is to direct rectification of the register by striking out the name of Mrs. Ethel Bergin and inserting as owner with an absolute title the name of Mrs. Wardman. With regard to the charges register, there is no ground for interfering with it and directing any rectification. They are good charges and remain enforceable against the property.

Solicitors: *Craigen, Hicks & Co.* (for the applicants); *Gibson & Weldon* (for the respondent, Mrs. Massingham); *T. & N. Blanco White* (for the respondent, Frederick Thomas Baker); *Osmond, Bard & Co.* (for the respondent, the trustee in bankruptcy of Mrs. Ethel Bergin, deceased); *Coldham, Birkett & Fleuret* (for the respondents, M. B. Foster & Sons).

[*Reported by* CHARLES E. EDEN, ESQ., *Barrister-at-Law.*]

WILLIAMS *v.* HUGHES.

[King's Bench Division (Lord Hewart, L.C.J., du Parcq and Goddard, JJ.), **March 26, 1936.**]

Agriculture—Minimum wages—Deduction—Benefit received by worker—Agricultural Wages (Regulation) Act, 1924 (*c.* 37), *s.* 7 (11).

A farmer, in calculating the wages of one of his workers, deducted the value of certain lodgings which were available to the latter. The worker had not agreed to accept such accommodation and did not in fact avail himself of it, preferring to sleep at his own home, which was about half a mile distant :—

Held : the value of the lodgings was not a benefit or advantage received by the worker within the Agricultural Wages (Regulation) Act, 1924, s. 7 (11), and the deduction ought not to be made.

[**EDITORIAL NOTE.** The point here is a short one, and is that the statute requires the benefit to be "received" by the worker. The farmer, no doubt, had intended the lodgings to be occupied by the worker, but that is not sufficient. It should be noted also that the regulations of the local committee required the worker to agree to accept the benefit as part of his remuneration, and this, also, had not been done. This case, however, does not appear to have turned on that point in any way.

As to Agricultural Wages, see HALSBURY, Hailsham Edn., Vol. 1, p. 394, para. 658 ; and for Cases, see DIGEST, Vol. 44, p. 1301-1302, Nos. 63-70 ; for the Agricultural Wages (Regulation) Act, 1924, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 1, p. 127.]

Appeal by way of case stated from a decision by justices under the Agricultural Wages (Regulation) Act, 1924. The question raised was whether a farmer had paid wages at not less than the minimum rate, where he had taken into account the value of lodgings which were available to the worker, although the worker had not agreed to avail himself of those lodgings and had not in fact availed himself of them. The Agricultural Wages (Regulation) Act, 1924, s. 7 (11) provides :

> Subject to any definition under this Act of the benefits or advantages which may be reckoned as payment of wages in lieu of cash and the value at which they are to be reckoned, and to any limitation or prohibition under this Act of the reckoning of benefits or advantages as payment of wages in lieu of cash, the court may, in any proceedings under this Act, reckon as a payment of wages such amount as in the opinion of the court represents the value of any benefits or advantages received by a worker under the terms of his employment.

The local committee had made regulations, as required by sect. 8 of the Act, defining the benefits and advantages which might be reckoned as payment of wages in lieu of payment of wages in cash, and these regulations enabled the value of the lodgings to be reckoned where the worker on his engagement agrees to avail himself of lodgings provided by his employer.

H. Hull, for the appellant : It was in the mind of both employer and

employee that the lodgings were available, but the worker preferred to sleep at his home, which was only half a mile away from the farm. The justices came to a wrong determination, as the lodgings, though available for the employee, were in fact a benefit which was not received by the employee.

The respondent was not represented.

LORD HEWART, L.C.J.: The value of the benefit of the lodgings shall not be taken into account unless it shall be "received." It is quite clear the appeal must be allowed. The case must go back to the justices with a direction that the full amount of the wages, not diminished by the supposed value of the lodgings, must be paid.

DU PARCQ and GODDARD, JJ., agreed.

Solicitor: *The Official Solicitor for the Ministry of Agriculture and Fisheries.*

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

CHURCHILL AND SIM *v.* GODDARD.

[COURT OF APPEAL (Lord Roche, Scott, L.J., and Eve, J.), **February 27, 28, and March 18, 1936.**]

Agency—Del credere agent—Buyer's acceptance for price of goods—Rejection of goods—Right to sue upon bill of exchange.

The appellants acting as *del credere* agents on behalf of a firm of timber exporters in Finland sold a cargo of timber to the respondent. Thereupon the appellants, in accordance with the contract of agency, paid the exporters the price of the timber, less their commission. In accordance with the contract of sale the respondent accepted two bills of exchange drawn by the appellants for the price of the timber. Subsequently the respondent rightfully rejected the timber. On presentation of the bills of exchange the respondent dishonoured his acceptances and the appellants then brought this action to recover upon the bills of exchange:—

HELD: (i) the appellants were not trustees or agents of the exporters in any way that would prevent them recovering on the bills of exchange.

(ii) the handing over of the shipping documents was good consideration for the respondent's acceptance of the bills.

(iii) there was no failure of consideration for the bills which were not affected by the failure of the consideration under the contract for the sale of timber and the appellants were entitled to recover.

[**EDITORIAL NOTE.** The action in the present case was purely an action on bills of exchange. The first defence raised was that the plaintiffs were acting merely as agents and trustees for the sellers of the timber and therefore the defendant, who was the buyer, might raise against the plaintiffs any defence that he had against the sellers. The decision, however, is that where a *del credere* agent has taken the buyer's acceptance for the price of the goods, the bill of exchange is a separate contract by which the *del credere* agent can sue by himself, and when he

does so he is not acting as an agent or trustee, but as a principal. The contract evidenced by the bill of exchange is not the contract of sale and purchase of the goods, and is therefore not affected by the fact that the goods subsequently turn out not to be of the nature or quality anticipated. The consideration supporting the bills of exchange is the handing over of the shipping documents, and thus the buyer's right of rejection or a claim in damages because the goods do not fulfil the stipulations of the contract as to quality affords no defence to an action brought upon the bills.

As to *del credere* agents, see HALSBURY, Hailsham Edn., Vol. 1, p. 201, para. 356, and for the Cases, see DIGEST, Vol. 1, p. 280, Nos. 120-127.]

Cases referred to :

(1) *Goddard* v. *Raahe O/Y Osakeyhtio* (1935), 53 Lloyd L.R. 208.
(2) *Barton, Thompson & Co.* v. *Vigers Brothers* (1906), 19 Com. Cas. 175 ; 39 Digest 521, *1361.*
(3) *Jordeson & Co. & Kahn* v. *London Hardwood Co., Ltd.* (1913), 19 Com. Cas. 161 ; 39 Digest 521, *1362.*
(4) *Flgtau, Dick & Co.* v. *Keeping* (1931), 36 Com. Cas. 243 ; Digest Supp.
(5) *Cochrane* v. *Green* (1860), 9 C.B.N.S. 448 ; 43 Digest 772, *2133.*
(6) *Agra & Masterman's Bank* v. *Leighton* (1866), L.R.2 Exch. 56 ; 43 Digest 796, *2336.*
(7) *Thornton* v. *Maynard* (1875), L.R. 10 C.P. 695 ; 43 Digest 796, *2337.*
(8) *Biddell Brothers* v. *Clement (E.) Horst Co.*, [1911] 1 K.B. 934 ; revsd., [1912] A.C. 18 ; 39 Digest 575, *1801.*

Appeal from a decision of Branson, J., given on May 17, 1935, in favour of the defendant in an action to recover upon two bills of exchange dated Oct. 8, 1934. The facts and arguments are stated in the judgments.

F. J. Tucker, K.C., and *Hon. Hubert L. Parker*, for the appellants.

A. T. Miller, K.C., and *R. E. Gething*, for the respondent.

Lord Roche : This is the appeal of the plaintiffs from a judgment of Branson, J., in favour of the defendant. The action was heard in the Commercial List and was brought in respect of two bills of exchange, dated Oct. 8, 1934, of which the plaintiffs were drawers and the defendant was acceptor. The amount of the claim with interest was £2,558 11*s.* 1*d.*

The facts giving rise to the action are as follows : The plaintiffs are timber brokers carrying on business in London and Liverpool. The defendant is a timber importer and merchant at Liverpool. At all material times the plaintiffs were sole agents in the United Kingdom for a number of Finnish timber exporters, including Messrs. Raahe O/Y, to whom I refer hereafter as Raahes. The terms of the agency were defined by a letter dated Nov. 28, 1932, which provided that the plaintiffs should stand full 100 per cent. *del credere* for all sales closed through them and that payment for complete deliveries should be made in cash against shipping documents, with the agreed deduction for commission, and the shippers had the right to draw upon the plaintiffs through a bank at three days' sight or to send the plaintiffs shipping documents direct, whereupon the plaintiffs were to pay the net invoice amounts within three days to the shippers' bank.

In March, 1934, the plaintiffs, as agents for Raahes, negotiated the sale from Raahes to the defendant of a quantity of wood goods to be shipped from Haukipudas between June and Sept., 1934. Two contracts, dated respectively Mar. 20 and 22, 1934, were drawn up by the plaintiffs in respect of these sales and were signed by the plaintiffs as brokers. The parties to the contracts were expressed to be Raahes as sellers and the defendant as buyer. The contracts were in f.o.b. form, contained specifications and various conditions and amongst such conditions the following :

(1) The prices to be free alongside ship. (4) Shiproom to be provided by buyers. (11) Payment to be made on receipt of and in exchange for shipping documents by approved acceptances of sellers' or authorised agents' drafts payable in London at four months from the date of bill of lading, or at buyers' option in cash less 2½ per cent. discount at three days' sight payable in London. Sellers to give notice of vessels arrival by telegraph, and buyers option as to mode of payment to be declared on receipt of such notice. (13) Property in goods to be deemed for all purposes except retention of vendors' lien for unpaid purchase price to have passed to buyers when goods have been put on board. (17) Disputes to be settled by arbitration in England. Buyers not to reject the goods specified in the contracts but to accept and pay for them in terms of contract against shipping documents.

In Oct., 1934, the steamship "Sonja" loaded 240 standards of wood goods under the above-mentioned contracts and the defendant was duly advised by the plaintiffs on Oct. 8. There was an interval before the defendant declared his option as to payment because a question arose as to the quantity shipped, and on Oct. 22 this was settled by the plaintiffs on behalf of Raahes on the basis of an allowance of £16 for variation in quantity. On Oct. 26 the defendant returned to the plaintiffs the two drafts now put in suit accepted by him, having previously declared his option to pay in that manner and having received and retained the shipping documents for the "Sonja's" cargo. Meanwhile the plaintiffs had, on Oct. 23, in accordance with the terms of their agreement with Raahes, paid Raahes £2,415 19*s.* 3*d.*, being the full amount of the "Sonja" invoices less agreed deductions and the allowance of £16. When the plaintiffs received the defendant's acceptances to which they looked for reimbursement of their payment to Raahes, they, on Nov. 5, discounted them with and endorsed them to bankers, but no question arises as to the right of these endorsees as when the dispute, which had by this time arisen as to the quality of the goods, culminated in the defendant refusing or intimating that he would refuse payment of the drafts, the plaintiffs as drawers took up the bills. The dispute as to quality developed, and the defendant claimed to reject the cargo on the ground that it was not as specified. The bills were then dishonoured, and the writ in this action was issued on Feb. 14, 1935. By arrangement the goods were sold on behalf of whom

it might concern, and there was a considerable deficiency upon the realisation. The matter then went to an arbitration, which was in progress when the matter came before the trial judge. The arbitration was, of course, between the parties to the sale contracts.

On Apr. 17 an order was made in the action that the issue to be tried be limited to the question of the liability, if any, of the defendant on the bills, assuming for the purposes of this action that the defendant had a right to reject or to counterclaim as against the sellers under the arbitration then proceeding between the defendant and the sellers. The case was argued on that assumption upon the documents in the case and without further evidence, and on May 17 the learned judge decided in favour of the defendant for a reason which I will discuss later. Notice of appeal was given, and when the matter first came before this court, in order to avoid further debate and decision upon a hypothetical basis, the court directed that the appeal should stand over until the arbitration was decided. On June 12, 1935, an award was made in the form of a special case which raised amongst other questions the defendant's right to reject the cargo. The special case was argued before Lewis, J., on Nov. 16 and 20, and he decided that the defendant had a right to reject because the goods were not as specified (see *Goddard* v. *Raahe* (1)). The parties to this action agreed that the award in the arbitration might be referred to on this appeal as evidence of the facts therein referred to.

It is right to all parties concerned, including Messrs. Raahes, to say that the controversies and proceedings to which I have referred raised no question as to the will or ability of either the defendant or Raahes to meet any obligations they might be found to be under, and on the hearing of this appeal both sides wished it to be understood that Raahes would undoubtedly meet their obligations under the award, and that the question was one of principle and of importance, namely, upon whom did the burden fall of arranging a final adjustment with and payment by the sellers in circumstances such as exist here. If the buyer were entitled to refuse payment of the bills, that burden would fall upon the agents. The business convenience of this result to the defendant and to other timber importers in similar cases is obvious. Naturally, however, the plaintiffs desire to maintain the rights they conceive they have as holders of bills of exchange, and to escape from a conclusion which would in practice make *del credere* agents who are already responsible to the sellers for payment by the buyers also responsible to the buyers for due performance of contracts on the part of the sellers.

I can now pass to a consideration of the judgment under appeal. The learned judge stated that the contention of the defendant, upon which, as I read his judgment, he decided in his favour, was "that the plaintiffs acted throughout merely as agents for Raahes and are suing as trustees or agents for Raahes." He did not expressly observe

upon the fact that in the defence, after the grounds justifying rejection and giving rise to failure of consideration had been pleaded, it was alleged in para. 6 that the plaintiffs at all material times had notice of the matters aforesaid. The defendant supplied no evidence of such notice and indeed it is plain that there was no such notice and that when the plaintiffs parted with the shipping documents and when they paid Raahes on Oct. 23 they had no reason to suppose but that everything was in order with the shipment, apart from the question already settled by an allowance. Several cases were cited to the judge as showing the history of similar dealings over a number of years and as showing how well known to the trade was the course of business by which brokers acted *del credere* and paid the sellers before the buyers paid them. In the cases cited agents, such as the plaintiffs, who had paid the sellers but had not obtained acceptances from the buyers, sought to maintain a claim against buyers for the price of goods or for the return of shipping documents. A claim which was, as I think, for the latter relief succeeded before KENNEDY, J., in 1906 (see *Barton, Thompson & Co.* v. *Vigers Brothers* (2)). A claim for payment of the price failed before PICKFORD, J., in 1913 (see *Jordeson & Co. & Kahn* v. *London Hardwood Co., Ltd.* (3)), as did a similar claim before ROWLATT, J., and the Court of Appeal in 1931 (see *Flatau, Dick & Co.* v. *Keeping* (4)). I do not gather that SCRUTTON, L.J. disagreed with the decision of KENNEDY, J., above referred to, if it was based on a claim for return of the shipping documents, and it appears from his judgment that there was also a decision (unreported) of another very eminent judge, HAMILTON, J., to a like effect as that of KENNEDY, J.

This form of claim for return of documents and the approval it has received in these cases has a bearing on another matter discussed at the trial and on the appeal, namely, what was the consideration for the bills, but otherwise, though historically interesting, they have no great bearing on the present case and indeed are wholly different from it in the most material respect. This was recognised by BRANSON, J., who said that these cases were "not on all fours" with the present case, inasmuch as in this case drafts which were drafts of the plaintiffs had been accepted by the defendant in exchange for the shipping documents. The plaintiffs' contention is that this makes all the difference, and that when they got the acceptances they got on well established principles of law and equity the protection which, I observe, ROMER, L.J., in his judgment in *Flatau, Dick & Co.* v. *Keeping* (4), at page 257, thought could and ought to be obtainable by means recognised in equity as available.

BRANSON, J., based his decision on an acceptance of the defendant's contention as to agency or trusteeship, which I have quoted from an earlier passage in his judgment. He said this:

> It is contended by the plaintiffs that by this acceptance a new contract arose

between them and the defendant under which the defendant contracted to pay them the amount of the acceptances without regard to any question which might arise between the defendant and Raahes as to the timber. The consideration alleged for the contract is the handing over by the plaintiffs to the defendant of the shipping documents. To this the best answer made by the defendant is, in my opinion, that no new contract was made at all.

Now I quite agree with the respondent's counsel that the learned judge did not mean by this that the bills did not constitute contracts. The emphasis is on the word "new," meaning a contract independent of the sale contracts. The judgment goes on to expand this reasoning and it is plain that the ground of the conclusion adverse to the plaintiffs is that in the view of the judge they were throughout agents and trustees for Raahes and had no better rights than Raahes, and therefore though they could sue they could not succeed. It is on this conclusion as to the position and therefore as to the rights of the plaintiffs that in my opinion the learned judge was in error. It is, of course, true that the plaintiffs were Raahes' authorised agents to receive payment when they handed over shipping documents. It was necessary and right that someone should be nominated in order that the buyer might get a discharge of his debt. But in dealing with either money or a bill of exchange the person receiving them might hold them for the seller or for himself in his own right according to the circumstances regulating his relationship to the seller. The bills were contracts, and the only contracts between the plaintiffs and the defendant. The law merchant and common law founded thereon of themselves, as I think, had regard only to the parties to negotiable instruments, and it was only because equity intervened and later because equitable defences were admissible at law that it was a good answer to a suit on such an instrument that he who brought it was trustee for another against whom the person sued had a good answer. (See *Cochrane* v. *Green* (5), and *Agra and Masterman's Bank* v. *Leighton* (6), *Thornton* v. *Maynard* (7).)

On the facts of this case, I am of opinion that the plaintiffs were in no sense trustees or agents for Raahes when they sought to recover on the bills. I see no difference between their position and that of a bank if payment to a bank had been directed by Raahes. If either the bank or the plaintiffs were collecting the proceeds of the bills for Raahes an answer good against Raahes would be an answer against the bank and against the plaintiffs; but if the bank had paid or settled with Raahes, as the plaintiffs had done here, then the bank could, as I think, collect the proceeds of the bills and succeed in a suit if payment were refused on the ground of the existence of a claim against Raahes on contracts to which the bank was no party. The plaintiffs, as I see it, are in no different position. It was somewhat faintly argued that they were, because they were the agents who effected the contracts of sale. But

as they were not parties to those contracts the circumstances of their agency in that regard seems to me to be wholly irrelevant.

For these reasons I think the judgment below cannot be supported on the grounds assigned by the learned judge. The respondent, however, sought to support the judgment on another ground as to which when it was presented to him the trial judge was against him. The ground was that the consideration for the bills of exchange had wholly failed when the goods turned out not to be the contract goods so that the defendant was entitled to reject them. As to this, BRANSON, J., said:

> I think that if it be assumed that a new contract arose upon the acceptances, this contention presents some difficulty by reason of the fact that the consideration is stated in the acceptances to be "Value received in wood goods per s.s. 'Sonja,'" with no reference to the description in the original contracts of sale, and it is therefore impossible without going outside the new contract to show a failure of consideration.

I so entirely concur in this reasoning of the learned judge that I only add two observations. The first is that the value expressly stated in the bills was, in my opinion, complete when the right of disposition over the "Sonja's" cargo was given up by the handing over of the shipping documents. The second is that the bills were intended to be negotiable instruments and though it would no doubt be possible in such documents to embody in express terms such a stipulation as "Wood goods per 'Sonja' in accordance with contracts of sale dated so and so," or "the terms or conditions of contracts of sale are incorporated herein," such expressions would be so unfamiliar and so contrary to the nature and tenor of an instrument intended to be negotiable (even if they did not make the bills conditional and therefore invalid) as to enforce the conclusion that it would be improper to imply them and as inadmissible, as on the facts it would be impossible to prove that it was the intention of the parties to vary the description of the consideration contained in the bills by the inclusion of such an additional stipulation. For these reasons, I am of opinion that the appeal should be allowed and judgment entered for the plaintiffs, with costs here and below.

SCOTT, L.J.: I agree with the statement of the facts contained in LORD ROCHE's judgment, and content myself with an epitome of those which, in my view, are alone material for our decision. They are very simple. As indeed appears from the cases cited on the argument of this appeal, it is notoriously common in the overseas timber trade of the United Kingdom for firms of agents like Churchill & Sim to act for North European sellers on *del credere* terms, receiving a comparatively high rate of commission as remuneration for their assumption of responsibility for the discharge by the buyers here of their contractual obligations to their sellers. Under this practice the seller forwards the

shipping documents to the agent, who thus from the invoice sees the price receivable from the buyer, and by the bill of lading obtains possession of the goods. The agent thereupon, or within a few days, pursuant to his *del credere* undertaking, pays his principal the invoice price less his commission. Whether the agent then by operation of law gets a possessory lien on the goods or not, as was argued for the appellants, it is, in my view, unnecessary to decide. In any case he has possession of the goods and will not part with that, unless he gets from the buyer cash or approved acceptance sufficient in amount to recoup his outlay to his principal the seller and to cover his *del credere* commission. He must get his money in this way, and it is to meet this commercial need of the *del credere* agreement, that the provision is inserted in the usual forms of contract of sale, providing in effect that if the buyer wants the usual trade credit terms he must give an "approved" acceptance, whether drawn by the seller or by his "authorised agent." If the seller himself draws, he sends his draft with the shipping documents to the agent. If he does not draw himself, he chooses his "authorised agent" —it may be a bank, or it may be his own *del credere* agent—and instructs him to draw on the buyer. The word "approved" before "acceptance" empowers the seller or his authorised agent, as the case may be, in the event of the buyer's financial standing not being thought good enough, to require a satisfactory name on the bill—if the buyer wants to use his option to ask for credit terms. Whether the seller draws himself or authorises somebody else to draw for him, he must send the bill of lading to the *del credere* agent, in order to put him in possession of the goods, as the latter will not pay the principal his net purchase price unless he has that possession. This being the course of business, it follows that if the seller chooses to draw himself, he will insert the name of his *del credere* agent as the payee; if he "authorises" a bank to draw, he will at the same time instruct the bank to protect the *del credere* agent by obtaining his "approval" of the buyer's name, or at any rate by seeing that the acceptance is financially "an approved acceptance," by drawing in favour of the agent or endorsing to him, by refusing to part with the shipping documents to the buyer, except in exchange for his "approved" acceptance, and finally by holding the acceptance on the agent's behalf, since he alone is interested in it, having already paid the seller the whole of his net invoice price. On the other hand, the seller is free to nominate his own *del credere* agent as his "authorised agent" and instruct him to draw upon the buyer. In this event the agent protects himself by refusing to part with possession of the goods, which the bill of lading confers on him, except in exchange for the "approved acceptance" of the buyer. The last course was followed in this case.

This appeal, in my view, can and ought to be decided on certain elementary grounds of bill of exchange law. The appellants sue as

holders for value under sect. 38 (1) and 27 (1) of the Act. They ask that the respondent should be held liable under sect. 54 (1). They point out that they were payees as well as drawers, and were therefore holders within sect. 2 ; that not only was value to be presumed in their favour (sect. 20 (1)), and that the respondent gave no evidence to disprove it, but that here the bills expressly stated the consideration which constituted the " value " (see sect. 2) in the words " value received in wood goods per s.s. 'Sonja' " ; and finally that those words were true in fact since by delivery to the respondent of the bills of lading they gave him possession of the timber—" value received in wood goods." In my judgment this argument is sound, apart from the further question of failure of consideration. It does not matter that the appellants had no proprietary interest in the goods ; it may be they did not even have a possessory lien—I express no opinion on that point one way or the other. But they had both in law and fact possession of the timber—see POLLOCK AND WRIGHT ON POSSESSION, 1888, Ch. II, sect. 6, and per KENNEDY, L.J., in *Biddell* v. *Horst* (8), at pages 956 and 957, in the well-known judgment which was subsequently approved in the House of Lords—and the transfer of possession to the respondent was authorised by the seller. It was thus certainly a good consideration for the respondent's acceptance, i.e., for making the contract contained in the bill of exchange. The presence of consideration is not an essential element of a bill of exchange contract as of an ordinary contract not under seal—it is presumed by the Act and was presumed by our law merchant before the Act. But as between immediate parties the defendant is entitled to prove absence of consideration moving from the plaintiff, as a defence to an action on the bill, and it is in replication to this defence that it was important for the appellants to point out that the respondent's acceptance recorded the receipt of the consideration, and further that the consideration was in fact given. There can, to my mind, be no question in the present case that the appellants gave good consideration —i.e., " value " within the meaning of the Act.

Then did that consideration fail ? Has the respondent discharged the burden of proving failure ? Has he given any evidence of failure ? On this part of the case I think the learned judge was right in his view, which was adverse to the defendant, and I am satisfied that each of these questions must be answered in the negative. The respondent got precisely what he bargained for in his written bill of exchange contract—possession of the wood goods per s.s. " Sonja." It may be that he got additional consideration in the other shipping documents—the invoices, copies, etc., but that is an immaterial addition. It is equally true that the giving up of possession by the appellants was in a business sense an act of vital importance to them. They were out of their money : they had not been paid their commission ; and the only business security

they had—whether legal or not does not matter—was the bills of lading. And it was just because our English bill of exchange law treats a bill of exchange in the hands of a holder for value in so many respects as almost like currency, that they could safely part with their sole business security in exchange for the respondent's acceptance. In truth it is only if this is the law that such a course of business could for practical purposes be followed.

If after parting with possession of the bill of lading, the *del credere* agent could be met with a defence founded on events for which he is in no sense responsible, such as the discovery by the buyers of a default by the seller on his contract of sale, it is obvious that this danger would make the above course of business impracticable. But I do not think there is anything in this defence. I see no ground whatever for the contention that there was any failure of the consideration contained in or given for the bill of exchange contract—which is the only consideration that is material to the action on the bill. That there was default and failure of consideration under the sale of goods contract is *nihil ad rem*. The *del credere* agent might well say as a business man, "I did not guarantee my principal against financial loss through his own breaches of his contract of sale"; and in my view the law—indirectly, no doubt, by the road I have travelled above—supports him.

The respondent as acceptor got the very consideration for which he bargained, namely, possession of "the wood goods per s.s. 'Sonja,'" and there was no failure of that consideration. The defence founded on the contention that the appellants were in the bill of exchange contract "mere agents and trustees for the sellers" fails altogether, quite simply because it was not the fact. They entered into the bill of exchange contract for themselves, and in their own right. And for the same reason, it follows that I hold that the learned judge was wrong in his view that as between appellants and respondent there was no new contract made by the bill of exchange transaction. It was of the very essence of the business position that a wholly new and independent contractual relationship was created by it, and one in which the sellers had in the circumstances no concern.

For these reasons I agree that the appeal must be allowed, and an order made in the terms pronounced by Lord Roche.

Eve, J.: I have had an opportunity of reading the two judgments which have just been delivered, and I agree so entirely with the conclusions at which they have arrived that I cannot say more than that I concur that this appeal must be allowed.

Solicitors: *Coward, Chance & Co.* (for the appellants); *Blundell, Baker & Co.*, agents for *Snowball, Kyffin-Taylor & Pruddah*, Liverpool (for the respondent).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

THE "PRINSES JULIANA," OWNERS OF THE MOTOR SHIP OR VESSEL "ESBJERG" *v.* OWNERS OF THE STEAMSHIP OR VESSEL "PRINSES JULIANA."

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J., with Trinity Masters), **February 5, 6, 7, 10, 11, 12, 1936.**]

Shipping—Collision—Waiting at bend rule—Entrance to harbour—Harwich Harbour Conservancy Board (1929) *Bye-laws, No.* 8.

(i) The "Esbjerg" was leaving and the "Prinses Juliana" was arriving at Harwich Harbour, both vessels being in charge of a pilot, when a collision occurred. It was necessary for the "Prinses Juliana" at the entrance to the harbour to round Beach End buoy:—

HELD: the Harwich Harbour Conservancy Board (1929) Bye-laws No. 8 applied to the entrance to the harbour, and the "Esbjerg, which was navigating against the tide, should have eased her speed and allowed the "Prinses Juliana" to pass clear of her.

(ii) The pilot of the "Prinses Juliana" was not called as a witness, although he had been *subpoenaed* by the owners of the "Esbjerg." The owners of the "Esbjerg" sought to put in the report of that pilot made to Trinity House after the accident:—

HELD: such report was inadmissible.

[EDITORIAL NOTE. The Bye-law No. 8 here discussed is in its terms practically identical with the "waiting at bend" rule, and as the original rule applied generally to navigable rivers, the particular bye-law is in its terms restricted to the fairway. The point here discussed is whether the bye-law applied to a bend which was in fact at the entrance to the harbour, and it was held that the rule applied and that a vessel leaving the harbour against the tide ought to wait until a vessel entering the harbour with the tide had rounded on to her course up the harbour. Incidentally, a small point on evidence arose as to the admissibility of a pilot's report to Trinity House. It would appear that after the pilot's service has ceased he is not the agent of the owners of the ship and statements made by him are not to be treated as admissions by the owners.

FOR LOCAL RULES OF NAVIGATION, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 479-482, para. 696; and FOR CASES, see DIGEST, Vol. 41, pp. 761-768, Nos. 6140-6221; and FOR "WAITING AT BEND" RULE, see HALSBURY, 1st Edn., Vol. 26, Shipping, p. 496, para. 717; and FOR CASES, see DIGEST, Vol. 41, p. 703, Nos. 5376-5380; AS TO ADMISSIBILITY OF REPORTS, see HALSBURY, Hailsham Edn., Vol. 13, p. 689, para. 762: and FOR THE CASES, see DIGEST, Vol. 22, pp. 331-333, Nos. 3292-3313.]

ACTION for damage resulting from a collision between the "Esbjerg" and the "Prinses Juliana" in the entrance to Harwich harbour on June 29, 1935.

The Harwich Harbour Conservancy Board (1929) Bye-laws, No. 8, provides:

> A steam vessel navigating against the tide shall, on approaching points or sharp bends in the fairway, ease her speed and if necessary stop and wait before rounding, so as to allow any vessel navigating with the tide to round and pass clear of her.

H. G. Willmer and *Owen L. Bateson*, for the plaintiffs.

Kenneth Carpmael, K.C., *J. V. Naisby*, and *E. E. Addis*, for the defendants.

Bucknill, J.: This case arises out of a collision between the twin-screw motor ship "Esbjerg" and the twin-screw steamship "Prinses Juliana" in the entrance to Harwich harbour about 6.40 p.m. British summer time, on June 29, 1935.

At the time of the collision the "Esbjerg" was outward bound from Harwich on a draught of 12 feet 9 inches forward and 14 feet 9 inches aft. The "Prinses Juliana" was inward bound to Harwich and was drawing 11 feet 1 inch forward and 13 feet 7 inches aft. Each vessel was in charge of an experienced Trinity House pilot. Pilotage was compulsory for each vessel. The weather was fine and clear, there was no material wind, and the tide was about an hour's flood of the force of 1½ to 2 knots. At the time when the vessels became clearly visible to one another the "Esbjerg" was proceeding down the harbour and was making about 12 knots. The "Prinses Juliana," on the other hand, was outside the entrance to the harbour and was proceeding to the westward before making the turn into the entrance. The "Prinses Juliana" was making about 16½ knots, which was shortly afterwards reduced to 15 knots. The vessels remained in sight of one another, and collided at an angle of 2 to 3 points, the stem and starboard bow of the "Esbjerg" striking the starboard side of the "Prinses Juliana" a little abaft amidships, just above the water line, and doing great damage.

The precise place of the collision was in issue: the evidence on this point varied between 400 and 1,500 feet to the northward of the Cliff Foot Buoy. The captains of both ships agreed that the collision was well to the westward of mid-channel. According to the evidence from the "Esbjerg," which I accept, the "Esbjerg" duly got on to a course of south-west by south half south magnetic and came down the harbour on her own starboard side of the channel with the Cliff Foot Buoy right ahead, at a speed of about 12 knots. As the two vessels approached one another, those in charge of the "Esbjerg" noticed that the "Prinses Juliana" was taking a very wide sweep into the harbour round the Beach End Buoy. The "Esbjerg" continued on her same course and speed, expecting the "Prinses Juliana" to come round in time to pass the "Esbjerg" port to port. But when the "Prinses Juliana" was about 400 yards away and was from a point to a point and a half on the port bow of the "Esbjerg" and was still about 2 points off her proper course up the harbour, the "Prinses Juliana" stopped her swing to starboard and sounded two short blasts. The engines of the "Esbjerg" were at once stopped and put full speed astern, the wheel was put hard-a-port, and her whistle was sounded two short blasts, but the "Prinses Juliana" crossed the "Esbjerg's" bows and the collision happened.

According to the witnesses from the "Prinses Juliana," the "Prinses Juliana" reduced her speed to 15 knots just before reaching the Rolling Ground Buoy. When the "Prinses Juliana" was about 200 yards south-east of the Beach End Buoy and had the Beach End Buoy and the Cliff Foot Buoy in line, the wheel was put to starboard by order of the pilot. The master then came on the bridge after a short absence. Shortly afterwards, when this buoy was abeam and about 200 feet off, the wheel was put hard-a-starboard by order of the pilot. Both these helm orders were given for the purpose of rounding into the harbour. When the "Esbjerg" was about three or four cables distant and was bearing four to five points on the starboard bow of the "Prinses Juliana," which was heading about north west half north and was under hard-a-starboard wheel, the master of the "Prinses Juliana," according to his evidence, said to the pilot: "You won't clear her (meaning the "Esbjerg"), you will have to steady her." The pilot made no reply and gave no order, and the master himself then told the helmsman to steady the ship and immediately after the order to steady the helm the master of the "Prinses Juliana" gave the order hard-a-port, and stopped both engines and ordered two short blasts to be sounded. No reply was heard from the "Esbjerg" and the master then put both engines full astern for a few revolutions and sounded two short blasts again and then stopped both engines and gave a third signal of two short blasts, and then put the starboard engine full ahead and port engine full astern for a few revolutions, and then stopped both engines, and just before the collision put port engine full ahead and starboard engine full astern, and put the wheel hard-a-starboard so as to try to make a glancing blow of it. A few seconds before the collision the "Esbjerg" was heard to sound two short blasts.

It will be seen on comparison of the two cases that there is not really much conflict as to the essential facts leading to the collision. There is some discrepancy as to the number of whistle signals sounded by the "Prinses Juliana" and the precise moment when the "Esbjerg" sounded her two short blasts. As to this, I find that the "Esbjerg" replied after an interval of a few seconds to the first signal of two short blasts from the "Prinses Juliana" and that they did not hear any further signal from the "Prinses Juliana"—this being probably due to the excitement caused by the impending collision. I think that those on the "Esbjerg" would naturally notice the check in the swing to starboard of the "Prinses Juliana" a little after the order was given on board the "Prinses Juliana," and that there is no substantial discrepancy on this point. The vessels would have also drawn closer by the time the checking of the swing to starboard of the "Prinses Juliana" was noticed on the "Esbjerg." It must be borne in mind that the vessels were closing on one another at the rate of about 900 yards a minute.

When two fine, well equipped and handy vessels such as the "Esbjerg" and the "Prinses Juliana," each in charge of an experienced Trinity House pilot and manned by an experienced master, officers and crew, and each accustomed to go in and out of Harwich harbour, thus collide on a fine summer afternoon, it is clear that there was serious negligence somewhere. The explanation of the collision given by the "Esbjerg" is that the "Prinses Juliana" suddenly changed her mind and went to port and in so doing turned a position which was safe or momentarily becoming safe into a position in which a collision was inevitable. The explanation of the master of the "Prinses Juliana" is that the vessels were never in a position which was safe or becoming safe, and that the only possible chance of averting a disastrous collision was to do what he did. Upon this conflict of view the court did not have the advantage of hearing the evidence of the pilot of the "Prinses Juliana." The defendants, the owners of the "Prinses Juliana," elected not to call her pilot as a witness. The plaintiffs, the owners of the "Esbjerg," had *subpoenaed* him, but did not call him as a witness. The plaintiffs sought to put in as evidence in support of their case the report which the pilot of the "Prinses Juliana" made to Trinity House after the accident in accordance with the rules and by-laws of Trinity House, but the defendants objected to this course on the ground that the report was inadmissible as evidence. I upheld the objection. The absence of the pilot as a witness for the "Prinses Juliana," together with his silence when spoken to by the master, as to which I have already referred, leads me to think that the pilot considered that his orders were proper and that the master was wrong in interfering with these orders while the "Prinses Juliana" was entering the harbour.

The first question I have to decide is whether the action of the master of the "Prinses Juliana" in giving the orders which he gave was unseamanlike. The fact that the pilots on each of the vessels concerned were apparently satisfied with the position indicates that in their view the vessels would clear one another without any action or further action on their part. I saw the master of the "Prinses Juliana" in the witness-box. He has an excellent record, and has been in command of the "Prinses Juliana" for fifteen years. I am satisfied that when he countermanded the order of the pilot, he believed that the vessels could not clear if the "Prinses Juliana" continued her swing to starboard, and that he acted as he thought for the best in the interests of his passengers and crew and ship. Having regard to the speed of each vessel and the turn which the "Prinses Juliana" had still to make to get port to port with the "Esbjerg" at the time when the master gave the order to steady the wheel, I think that the master had some cause for anxiety. But I think Mr. Willmer's contention was right that if the master sees fit to take the navigation out of the hands of the pilot and countermands

his orders, he must satisfy the court that he was justified in so doing, and that the action which he took was at all events more calculated to avoid a collision than the manoeuvre which he countermanded.

The point which I have to decide on this aspect of the case seemed to me to be a matter on which I should consult the Elder Brethren. I have accordingly asked the Elder Brethren to assume the course and speed of the "Esbjerg" to be as already stated in my judgment, and the position of the two ships to be as stated by the master of the "Prinses Juliana" and stated by me in my judgment, at the time when the master of the "Prinses Juliana" ordered the helm to be steadied. Upon these assumptions which are my findings of fact I have asked the Elder Brethren to advise me whether in their view there was a risk of collision if the "Prinses Juliana" had continued on with her manoeuvre and the "Esbjerg" had continued on her course and speed. Their answer to this question is that in their view the "Prinses Juliana" would have cleared the "Esbjerg" with a safe margin and passed her port to port, if she had continued on with both her engines working at full speed ahead and her wheel hard-a-starboard, and the "Esbjerg" had kept her course and speed.

I have also consulted the Elder Brethren on this further question. Assuming there was risk of collision which required action by the master of the "Prinses Juliana," did he take the action which a skilful seaman ought to have taken? The answer of the Elder Brethren to this question is emphatically that the master of the "Prinses Juliana" took the wrong action. In their view the captain of the "Prinses Juliana" in any case ought not to have given an order to go to port under the circumstances, but, if he thought action was required, he should have kept the wheel hard-a-starboard and the port engine full ahead and have slowed or stopped his starboard engine, and thereby accelerated his turn, or alternatively, he should have gone full speed astern with both engines. According to the evidence of the master of the "Prinses Juliana" his ship can be pulled up in three ship's lengths from full speed by going full astern. I agree with this advice of the Elder Brethren to both these questions.

The collision which was brought about was in fact very near a disaster. A strip of about 100 feet of the starboard plating and belting of the "Prinses Juliana" was peeled off by the stem of the "Esbjerg," and if this damage had been below the water instead of being just above it, there would probably have been serious loss of life.

I have now to consider how it came about that this condition of things which gave the master some cause for anxiety arose, and whether either of the two ships was to blame for causing such a state of things to come into being. On this part of the case I have to consider two main questions. The first one is whether the "Esbjerg" committed a breach

of bye-law 8 of the Harwich bye-laws. In my view this bye-law applied. I think that the "Esbjerg" was approaching a point or sharp bend in the fairway and that it was her duty to act under the bye-law. I think she committed a breach of the bye-law in not easing her speed, and that this breach contributed to the collision. The question as to the gravity of the breach by the "Esbjerg" appears to me to depend mainly on the place of collision, and on the way in which the "Prinses Juliana" in fact rounded the point or sharp bend. In coming to a decision on this part of the case I have to consider and weigh the evidentiary value of the position of the wreckage as found, and of the photograph taken by Mr. Lucas of the "Prinses Juliana" shortly after the collision. I think it is possible that the wreckage as located was not in the precise position of the two ships when the piece of wreckage was sheered off or was torn off. It is possible that the wreckage was carried on a little by the stem of the "Esbjerg." After considering the matter carefully and consulting with the Elder Brethren as to this point, and also as to the possibility of movement of the wreckage by attachment of the dredger to it, by influence of passing ships or by a possible error in taking the sextant angles and after considering the oral evidence, and especially from those in charge of the ship and of Mr. Learmont, a reliable witness, I find that the collision took place about 800 feet from the Cliff Foot Buoy and well over on the west side of the fairway.

On this finding of fact it appears to me that the "Esbjerg" not only committed what might be considered a technical breach of the rule by not easing her speed, but that the position of the "Prinses Juliana" was in such proximity to the apex of the turn that it was necessary for safety that the "Esbjerg" should take off her way sufficiently to give the "Prinses Juliana" more time and room to get round. I therefore find the "Esbjerg" to blame for a substantial breach of bye-law 8. Even if the bye-law does not apply, I should find that she was to blame for breach of good seamanship in not reducing her speed when approaching the point and the "Prinses Juliana."

The questions that remain are these: (1) whether the "Prinses Juliana" was also to blame for not keeping to her own proper side of the channel in making the turn; (2) whether the "Esbjerg" was negligent in not taking proper action immediately those in charge of her saw the "Prinses Juliana" check her swing.

Art. 25 of the Collision Regulations applies to these waters, and is in the following terms:

> In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

It is to be noted that the rule says "when it is safe and practicable"

Having regard to the existence of bye-law 8, which I have held applies in this case, and to the state of the tide, and to the length of the "Prinses Juliana," I do not think that the "Prinses Juliana" was negligently navigated up to the time when the master ordered the wheel amidships. Up to that time I think the "Prinses Juliana" had kept in her proper water, and as I have already said, would have cleared the "Esbjerg" port to port. Her breach of art. 25 arose when the master gave the steady and hard-a-port. As regards the other point, I am unable to see any ground for saying that the "Esbjerg" was negligent after she heard two short blasts from the "Prinses Juliana." On both these points my views are supported by the advice of the Elder Brethren.

In the result, therefore: the "Esbjerg" committed the initial act of negligence, and this negligence continued until the "Prinses Juliana" also committed an act of negligence which in fact brought about the collision But the negligence of the "Esbjerg" contributed to the collision, because it was her negligent proximity which led the master of the "Prinses Juliana" to give a wrong order.

Having regard to the fact that the master of the "Prinses Juliana," wrongly as I think, and without any justification, took the matter out of the pilot's hands, and without the pilot's consent, and gave a wrong order without which no collision would have happened, I think the preponderance of blame is clearly on the "Prinses Juliana." I apportion the blame as follows—two-thirds to the "Prinses Juliana" and the "Esbjerg" one-third to blame.

Solicitors: *Thomas Cooper & Co.* (for the plaintiffs); *Stokes & Stokes* (for the defendants).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

LONDON & NORTH EASTERN RAILWAY CO. *v.* COUNTY COUNCIL OF THE NORTH RIDING OF YORKSHIRE.

[House of Lords (Lord Blanesburgh, Lord Russell of Killowen, Lord Macmillan and Lord Maugham), **February 10, 1936.**]

Railways—Public highway—Bridge—Repair of roadway—Great North of England Railway Act, 1837 (*c. cii*), *ss.* 31, 33, 35.

The Act of Parliament incorporating the predecessors of the appellants provided *inter alia*: "In all cases in which the railway shall cross any . . . public highway . . . such public highway shall be carried over the said railway . . . at the expense of the said company, by means of a bridge." It was admitted that the appellants were liable for the repair and maintenance of the bridge in question in this case, but they contended that they were not liable to repair the road over it:—

Held: the word "bridge" included the highway over it and the appellants were therefore liable to repair so much of the road as ran over the bridge and the approaches thereto.

[**EDITORIAL NOTE.** This case finally confirms what has been regarded as settled for some time past; namely, that a statutory obligation to construct a bridge, followed by a provision that the roadway over the same shall be formed, imposes on the undertakers the duty of maintaining not only the bridge, but also the roadway and the approaches on each side of the bridge. It is understood that by approaches is here meant that part of the roadway that has been raised or interfered with by the construction of the bridge.

For the Duty to Maintain Bridges, see HALSBURY, Hailsham Edn., Vol. 16, pp. 408, 409, para. 575, 576 and for Cases, see DIGEST, Vol. 26, pp. 586, 587, Nos. 2772-2778.]

Cases referred to:—

(1) *A.-G.* v. *Midland Railway Co.* (1909), 99 L.T. 961; 100 L.T. 866; 26 Digest 587, *2777.*

(2) *Lancashire and Yorkshire Railway Co.* v. *Bury Corpn.* (1889), 14 App. Cas. 417, *affg.* (1888), 20 Q.B.D. 485; 26 Digest 586, *2776.*

(3) *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *A.-G.*, [1915] A.C. 654; 26 Digest 581, *2716.*

(4) *Hertfordshire County Council* v. *Great Eastern Railway Co.*, [1909] 2 K.B. 403; 26 Digest 587, *2778.*

(5) *A.-G.* v. *Great Northern Railway Co.*, [1916] 2 A.C. 356; 26 Digest 582, *2719.*

Appeal from an order of the Court of Appeal affirming an order of Luxmoore, J.

Gavin T. Simonds, K.C., Raymond Evershed, K.C., and *A. Andrewes-Uthwatt* for the appellants.

A. Grant, K.C., and *Wilfrid M. Hunt* for the respondents.

Lord Blanesburgh: My Lords, in 1837, in the early days of railway construction, a private Act, 1 Vict. c. cii—I will call it the Act of 1837—was passed authorising the Great North of England Railway Company, thereby incorporated, to construct a railway line passing

on its way through the North Riding of Yorkshire, and intersecting in its course divers turnpike and other public roads. The railway authorised by the Act and the powers, privileges and obligations of the original company in relation thereto have passed to the appellants, the London and North Eastern Railway Company. The railway is now a section of their main line, and the question raised by this appeal is whether they, as has been so far adjudged, are liable to maintain and keep in repair such parts of certain of these intersected roads as pass over or are included in the structure of certain bridges erected by the original company under the Act of 1837 for carrying over their railway the roads so intersected.

In 1836 another railway Act had been passed (6 & 7 Will. 4, c. cvii) containing provisions with reference to the construction and maintenance of bridges over intersected country and turnpike roads in the County of Derby, closely analogous to the Act of 1837, and in 1908 an action was brought by the Attorney-General on the relation of the Derbyshire County Council against the Midland Railway Company, to which the railway authorised by the Act of 1836 had passed, in order to have it determined whether that company was under the Act of 1836 liable for the maintenance and repair of what in that instance was a turnpike road carried by a bridge over the railway. And there the liability of the railway company was established before PARKER, J. and on appeal by the Court of Appeal (1). Until 1932 that decision was treated by the appellants and their predecessors as regulating their liabilities under the Act of 1837; and when in that year, they disclaimed further liability and this action was brought by the respondents to establish it, the question was in both courts below disposed of upon the footing, accepted by the appellants, that it was there concluded by the earlier authority. An arranged form of declaration was, on that basis, and without argument, made by LUXMOORE, J. and an appeal was by the Court of Appeal, again without argument, dismissed. This procedure was adopted in order that the decision in the *Derbyshire* case (1) might be reviewed in this House. The present appeal has been regarded as one from the judgment in that case.

The parties raise no issue as to the standard of repair required. No matter of fact is in dispute, and except as qualified by the declaration, in this respect agreed to, each of the roads over the bridges in question, with their respective approaches, stand, so far as the appeal is concerned, in the same position. For convenience the parties have concurred upon a statement of the facts as regards the road running over a bridge known as Zetland Bridge. That road, part of the highway from Northallerton to Yafforth, is an ancient public carriage road which has existed since long prior to the year 1837. The road never was a turnpike road. Under or by virtue of the Local Government Act, 1929, it

has become and is a county road and the respondents under that Act became and they are now the body liable for its maintenance and repair except as to any part of it for the maintenance and repair of which the appellants may be liable. The road is carried over the appellants' railway line near Northallerton by the Zetland Bridge and its approaches. The question of liability now raised may be conveniently considered with the Zetland Bridge and the road over it in view.

The sections of the Act of 1837 upon which the question at issue depends, are a fasciculus of clauses numbered 31 to 38. No question of common law liability in the event arises. By these sections roads are divided into two classes—(A) turnpike roads, with which we are not directly concerned; and (B) other public highways not being turnpike roads, with which we are directly concerned. Sects. 31, 36 and 37 apply to both classes of roads; Sects. 32 and 33 apply to turnpike roads exclusively and sects. 34 and 35 apply only to roads other than turnpike roads. Sects. 31 and 35 are the sections immediately relevant, and it will not, I think, be necessary, even for convenience of reference, to do more than set forth these two sections, together also with sect. 33 in order thereby to point the distinction made by the Act in this matter of repair and maintenance between turnpike roads and other public roads. These selected sections are as follows:

31. And be it further enacted, that in all cases in which the railway by this Act authorised to be made shall cross any turnpike road or public highway, either such turnpike road or public highway (except such as are hereinafter mentioned) shall be carried over the said railway, or the said railway shall be carried over the said turnpike road or public highway, at the expense of the said company, by means of a bridge, where not otherwise provided for by this Act, of such construction as is in this Act mentioned.

33. And be it further enacted, that in all cases where a turnpike road shall be carried over the said railway, such turnpike road shall be efficiently defended and supported by and with proper walls and other sufficient fences for the protection of passengers using the same; and as well where a turnpike road shall be carried over the said railway as where the said railway shall be carried over a turnpike road, the several works so to be made, constructed, executed, and completed as aforesaid, with the inclinations of such turnpike road, and the approaches to or towards the said railway, shall be so made, constructed, executed, and completed in manner aforesaid, by and at the expense of the said company, in a proper and workmanlike manner, to the satisfaction of an uninterested competent road surveyor to be appointed by the trustees of such turnpike road and the said company, or, in case they shall disagree about the same, by the clerk of the peace for the county or riding into or through which the part of the turnpike road so to be altered or made shall lie or pass; and the said company shall at all times and on all occasions thereafter well and sufficiently maintain, uphold, amend, and keep in repair the bridges, tunnels, arches, drains, sinks, sewers, under-drains, parapet walls, fences, and the walls, banks, mounds, batteries, erections, and other works for the support of such bridges, tunnels, arches, turnpike road, and approaches thereto respectively, and for the protection of all persons, horses, and cattle using such turnpike road, and after any such turnpike road shall have been so made,

constructed, executed, and completed by and at the expense of the said company in manner as aforesaid, the same shall, for ever thereafter, be vested in and become the right and property of the trustees of such turnpike road; but all mines, minerals and fossils laying under the same shall be the property of the person or persons who would from time to time have been entitled to the same if this Act had not been passed, and the subsequent surface repairs of such turnpike road shall from thenceforth be made and performed by the trustees of such turnpike road from time to time out of the funds applicable to the repair of such turnpike road.

35. And be it further enacted, that in all cases in which any bridge shall be erected for the purpose of carrying any public carriage road over the railway by this Act authorised to be made, the road over such bridge shall be formed and shall at all times be continued of such width as to leave a clear and open space between the fences of such road of not less than twenty feet; and the ascent of every such bridge for the purpose of such public carriage road shall not exceed one foot in twenty feet, and in the case of any private carriage road shall not exceed one foot in sixteen feet; and a good and sufficient fence shall be made on each side of every such bridge, which fence shall not be less than four feet above the surface of such bridge.

My Lords, it must, I think, be agreed that there is not by these clauses imposed upon the railway company in express words, any obligation to repair or maintain anything which by the statute the company is required to construct, but, as LORD PARKER expressed it in the *Derbyshire* case (1), the courts very easily imply such an obligation where a body by statute authorised in that behalf has, for its own purposes, interfered with a public road. And the case here is, I think, on sect. 31 alone concluded against the appellants by two circumstances. The first is a decision of this House in *Lancashire and Yorkshire Railway Company* v. *Bury* (2), affirming the judgment of the Court of Appeal to the effect that under the first words of the Railways Clauses Consolidation Act, 1845, s. 46—words in substance equivalent to those of sect. 31 of the Act of 1837—the word "bridge" included the highway over it. And the second is an admission of liability by the appellants to which reference will presently be made. The decision alluded to is, I think, most clearly given in the words of FRY, L.J., in the Court of Appeal. He says:

> It was argued that "bridge" does not include the road over the bridge; and that the section imposes no liability on the railway company to maintain the roadway. . . . It seems to me that in cases to which the section applies, they are bound to make a bridge, and to make a roadway over the bridge as part of the bridge. It appears to me that by the ancient law of England, where a bridge formed part of the highway, the bridge included the roadway over the arches of the bridge. The Statute of Bridges, 22 Hen. 8, c. 5, is silent as to the roadway over the bridge, but it is not disputed that the liability under that statute extended to such roadway.

And, my Lords, the admission of the appellants above referred to, which must be read in connection with the statement of FRY, L.J., of the effect of a section the counterpart of sect. 31 is that the original

company was bound to construct Zetland Bridge with the defined road properly metalled and completed laid across it, and was bound further to maintain the bridge and keep it in repair.

I am content, for the result, to refer again to Fry, L.J., where he says at page 489, " whatever under the section the company are bound to execute, they are also bound to maintain." If " bridge " includes the road over it, the appellants' admission, I think, necessarily made, carries the whole case against them. It is not open to them to discriminate between the bridge and the road.

But, my Lords, the *Bury* case (2) by itself and apart from that admission, would not, as I read the decision, be enough for the respondents here. While the question might remain in doubt on Lord Herschell's judgment in this House, it is made clear by the Court of Appeal that the obligation to maintain, as distinct from the obligation to construct both bridge and road, was in that case asserted and found in the second part of sect. 46 which has no counterpart in our sect. 31, and which, it will be recalled, runs thus :

> and *such bridge*, with the immediate approaches . . . shall be executed and at all times thereafter maintained.

It is in this passage that Fry, L.J., finds the obligation to repair the roadway. He says :

> I have no hesitation in coming to the conclusion that the words " such bridge " in sect. 46 mean the bridge with the road on it which is constructed for the purposes of the highway.

In other words, the bridge there to be repaired is the bridge which by the *express* terms of the section is to be maintained, and we have no such provision in sect. 31 here. The equivalent of such a provision is, however, I think, in this case, supplied by the admission.

But, further, my Lords, the express terms of sect. 46 find their counterpart, I think, in sect. 35 of the Act of 1837. I am unable myself to take the view that sect. 35 is merely a construction section. I read it as imposing a direct obligation to construct the road and rails, etc., all as therein prescribed and to *continue* these works so constructed.

And it has to be noted that in the *Derbyshire* case (1) the analogue of sect. 35—sect. 73—was the only section of the 1836 Act on which the court could rely. That case related, as I have said, to a turnpike road, and sect. 70 of the Act of 1836, the analogue of sect. 31, did not apply to turnpike roads at all, while sect. 73, unlike sect. 35 here, did so apply. Both courts reached their conclusion on sect. 73, that is, our sect. 35, alone. And, in my judgment, they had warrant for so doing. But the case against the present appellants, when sect. 31 can also be invoked against them, is much stronger, because, in my judgment, sect. 35 is

not weakened by sect. 31 so extended. To the case against them, I can see no effective answer.

My Lords, the Derbyshire Act of 1836 contained no section like sect. 33 of the present Act, and, as a reason against the construction advocated by the railway company, reliance was in that case placed upon the inconvenience of leaving the repair of the bridge in one authority, and the repair of the roadway in another. In the present statute, sect. 33 is an enactment to that very effect. But that section throws the liability on the turnpike trustees. Had it been thrown on the railway company, the section would have been more eloquent for the appellants inasmuch as the inference would then have been immediate that its liability—however easily presumed—was not to be extended beyond the expressed limit. As the section stands, however, it is merely an intimation that in that case only is the presumptive liability of the railway company removed.

All these differences between the Act of 1836 and the Act of 1837, and the fact that the decision in the *Derbyshire* case (1) had reference only to a turnpike road, makes it difficult to regard that decision as completely covering the present—the supposition in the courts below. But as, in my judgment, the present is an *a fortiori* case, that difficulty is not serious. In my judgment this appeal should be dismissed and I move your Lordships accordingly.

LORD RUSSELL OF KILLOWEN: My Lords, I agree that this appeal must fail; but my opinion is not based either on sect. 35 of the Great North of England Railway Act, 1837, or on the judgments of PARKER, J., and the Court of Appeal in the *Midland Railway* case (1). Those judgments establish the railway company's liability to repair, by construing the section which, in the Act there in question, corresponds to the above-mentioned sect. 35, as imposing on the railway company an obligation to continue or maintain the road, i.e., to keep it in repair. As at present advised I feel grave difficulty in assenting to this view. Sect. 35 appears to me to be only a dimensional provision. Any obligation thereby imposed on the company appears to me to be an obligation to continue the width of the road—(i.e., to do nothing to reduce that width)—and not an obligation to maintain the surface of the road.

However, it is not necessary to pronounce a final decision as to this, because I feel myself constrained by authority of this House to hold that an obligation to repair the road is imposed on the railway company under or by virtue of sect. 31 of the Act. That section and the Railways Clauses Consolidation Act, 1845, sect. 46, are both as to purpose and language substantially identical; and notwithstanding the distinctions apparently drawn in sect. 46 between the bridge and the road, it was held in the *Bury* case (3) that the word "bridge" in the section included

the road, upon the ground that the road over the railway was part of the bridge. It is true that in the latter portion of sect. 46 of the Act of 1845 are to be found, as being things which the railway company must maintain, the following words: "such bridge, with the immediate approaches, and all other necessary works connected therewith." The decision in the *Bury* case (2) in your Lordships' House was not, however, founded on the presence of those words, but solely on the meaning of the word "bridge," and on the view that the road across the railway was in fact part of the bridge.

It is true that in the Act now in question, sect. 33 in terms treats a turnpike road crossing the railway as something distinct from the bridge, and not forming part of it. The result of this section is no doubt that any obligation to repair a turnpike road over the roadway which would otherwise be cast upon the railway company by sect. 31, is thereby placed upon the turnpike trustees; but this specific provision as to turnpike roads would not justify me in holding that the *ratio decidendi* of the *Bury* case (2) did not still apply to sect. 31.

It was conceded, and rightly conceded, that sect. 31 imposed an obligation on the railway company to keep in repair the bridge there referred to. It follows, if the road across the railway is included in and forms part of the bridge, that the obligation to keep in repair extends to the road crossing the railway.

Lord Macmillan: My Lords, there are various places in the North Riding of Yorkshire where the public highway is carried over the appellants' railway by a bridge. The question, broadly stated, is whether the appellants are bound to maintain at their own expense the roadway on these bridges.

The portion of the appellants' railway system with which the case is concerned was constructed by the appellants' predecessors the Great North of England Railway Company pursuant to the powers conferred on that company by a local and personal Act of 1837. The obligations imposed by that statute on the Great North of England Railway Company are now incumbent on the appellants and it is therefore necessary to examine the terms of the statute in order to see whether the liability in question is among the obligations so imposed.

The topic of road and railway crossings is dealt with in sect. 31 of the Act. Selecting from that section the relevant words, I find it enacted that, in all cases in which the railway shall cross any public highway, either the public highway shall be carried over the railway or the railway shall be carried over the public highway, at the expense of the company, by means of a bridge of such construction as is mentioned in the Act.

The appellants concede that under this enactment their predecessors were under an obligation initially to construct at their own expense not only the bridge but also the roadway upon it at all points where the

public highway had to be carried over the railway. They further concede that the enactment imposes upon them a continuing obligation to maintain at their own expense the structure of the bridge in all time coming. But in the matter of maintenance they seek to differentiate between the bridge and the roadway which it carries and they dispute their liability to maintain the latter.

The liability to maintain the structure of the bridge which the appellants concede has been imposed upon them is not made matter of specific obligation in sect. 31. It is, however, in my opinion, plainly implied. The section, as I read it, imposes a continuing obligation on the railway company at their own expense to carry the highway over the railway by a bridge and to fulfil that obligation the bridge must be maintained at their expense. But, in my opinion, the obligation equally extends to the maintenance of the roadway which the railway company were admittedly bound to construct on the bridge. It being conceded that in the matter of original construction the language of the section imposes upon the railway company the obligation without distinction to construct both bridge and roadway at their own expense, I can see no ground in the language of the section for discrimination between bridge and roadway in the matter of future maintenance.

The appellants' main argument was founded on the fact that the section by its own terms differentiates between the highway and the bridge which carries it. But when the section speaks of the public highway I do not think that these words refer to the highway as a structure contrasted with the bridge as a structure. They refer rather to the means of passage provided by the highway. The public in future are to be provided with a bridge as the means of exercising their public right of passage. If the bridge is to be a means of passage it must as a structure comprise the roadway upon it.

In the case of bridges over turnpike roads it is true that sect. 33 discriminates between the turnpike road and the bridge which supports it, but the obligation of performing "the subsequent surface repairs" is there imposed upon the turnpike trustees in express terms. Thus in this statute, when the Legislature means to impose this obligation upon any one other than the railway company, it says so.

Sect. 31 of the Act of 1837 is a precursor in less developed form of the Railways Clauses Act, 1845. s. 46. In the case of the latter section the language affords a stronger argument for discriminating between bridge and roadway in the matter of future maintenance, for sect. 46 contains an express obligation to maintain the bridge and says nothing about maintaining the highway. But this House, in *Lancashire and Yorkshire Railway Co.* v. *Mayor, &c. of the Borough of Bury* (2), held that the obligation to maintain the bridge included the obligation to maintain the roadway which it carried. That decision, which is binding

upon your Lordships, is a direct authority in favour of the interpretation which I place upon sect. 31 of the Act of 1837.

In the courts below the present case was assumed to be concluded by the decision in the case of the *Attorney-General* v. *Midland Railway Co.* (1), where a statute in substantially the same terms as the Act of 1837 was under consideration. There the decision that the railway company was bound to maintain the roadway on the bridge was found on a section, corresponding to sect. 35 of the Act of 1837, which required roads over bridges to be formed and at all times continued of a certain specified width. For my part I do not base my opinion in the present case on the language of sect. 35 of the Act of 1837, which seems to me to be a section fulfilling the promise held out in sect. 31 that the nature of the construction of the bridge will be found mentioned later in the Act, and thus to be a section merely prescribing the dimensions of the bridge which the railway company has already in sect. 31 been required to construct. So far as it goes, however, sect. 35 fortifies the view that the railway company are under a continuing obligation to maintain the roadway which they are required to form.

In the result accordingly I am of opinion that the judgment of the Court of Appeal, affirming the judgment of Luxmoore, J. (which contains the appropriate qualifications) should in turn be affirmed by this House.

Lord Maugham [read by Lord Macmillan]: My Lords, in the last year of the reign of King William the Fourth, one of the first railways made in this country was authorised by Parliament. The company was to be called The Great North of England Railway Company (6 & 7 Will. 4, c.105). In the following year another Act was passed authorising an extension of the line to the city of York and two additional branch railways, and some of the powers and provisions considered in the first Act were altered, amended or explained.

There were at that time in England over a thousand turnpike roads vested in and repairable by trustees and (as now) a great number of public highways were vested in different persons and repairable by divers public authorities. It was thought desirable to prohibit the passage of the railways over these roads by level crossings and accordingly the Act contained eight sections, numbered 31 to 38, to meet the difficulty, and it will be observed that the turnpike roads and the public highways were the subject of different regulations. Railway Acts at that time were in their infancy, and it is not surprising to find that the sections which give rise to the present questions are in some respects imperfect. The railway line necessarily had to pass over or under various turnpike roads and public highways, including in particular an ancient public carriage road and highway in the North Riding of Yorkshire, which is now a county road by virtue of the Local Government Act, 1929, repairable by

the respondents except as to any portion thereof for the repair of which the appellants may be liable. The road, pursuant to sect. 31 of the Act, was carried over the railway line by a bridge known as Zetland Bridge. Certain approaches with a gradient not exceeding one in twenty were constructed under sect. 35. The bridge and the approaches and the road were made by and at the expense of the railway company, and the road along the approaches and over the bridge as well as the approaches and the bridge till recently have been repaired from time to time by the company and their successors, the last of whom are the appellants. There are other ancient public carriage roads and highways (not being turnpike roads) which were carried over the same railway by bridges and approaches formed for that purpose by the railway company. These roads also have become county roads, and so far as repair is concerned they are in the same position as the road over Zetland Bridge and its approaches. It is convenient to take the latter as typical. The question raised on this appeal relates only to the repair of the roads, so far as they lie over the bridges and approaches, for it is conceded that the appellants are liable to maintain and repair the approaches and the bridges apart from the roads. No issue is raised as to the standard of repair, and it does not seem to be in dispute that the liability of the appellants, if it exists, is to maintain the roads over the bridges and approaches in the state in which such roads respectively were at the dates of their completion under the Act on the principle laid down by this House in *Sharpness New Docks and Gloucester and Birmingham Navigation* v. *A.-G.* (3). The judgment under appeal contains a declaration as to the liability of the appellants which is so limited. We have not the advantage of reading any reasoned judgments either of LUXMOORE, J., before whom the case first came, or of the Court of Appeal, for it was conceded that both courts were bound to follow decisions of PARKER, J., and of the Court of Appeal pronounced a quarter of a century ago in the case of *A.-G.* v. *Midland Railway Company* (1). Those judgments related to the true construction of a railway Act (6 & 7 Will. 4, c. 112) which contained sections so similar in form to sect. 31, 34 and 35 under consideration in the present case that this appeal in effect seeks to over-rule that authority.

My Lords, the question is one of the interpretation of a statute couched in somewhat elliptical terms by which provison is made for a case in which persons acting under the authority of a statute for their own purposes interrupt or alter a highway and are compelled to substitute works necessary to restore the highway so interrupted to public use. Except for the phrase that (taking the words appropriate to the present case) the highway "shall be carried over the railway at the expense of the company by means of a bridge" there are no words expressly requiring the company to construct and to maintain the bridge and its

approaches. Still less are there any words in plain terms providing for the construction and repair of the road as an entity separate from the approaches and the bridge.

There are two possible views of sects. 31 to 38. The one is that they contain a sort of code of the rights and liabilities of the persons or bodies concerned in relation to the subject-matter dealt with, in which case the provisions in the sections cannot be added to or modified by common law doctrines. The other is that the sections are intended only as a partial statement of those rights and liabilities, leaving matters not provided for either expressly or by necessary implication to be determined by the common law. Counsel for the appellants was bound to contend for the first alternative, for it is, I think, settled by authority that if the statute is silent the common law would throw upon the persons who have interrupted a highway under statutory authority an obligation at their own expense to restore to the public the use of the highway and to maintain it in a proper condition. The criticism which Lord Dunedin made in regard to a *dictum* of Fletcher Moulton, L.J., in the case of *Hertfordshire County Council* v. *Great Eastern Railway Company* (4) was only that the *dictum* was "too broadly expressed, as it would import a common law obligation running side by side with the expressed statutory obligation." He did not question the common law doctrine (The *Sharpness* case (4), at page 663). It may be noted that Lord Haldane (at page 662) and Lord Parker (at page 669) both took the same line. Lord Haldane, in his dissenting judgment in *Attorney-General* v. *Great Northern Railway* (5) (at page 369), stated his view of the common law principle in clear terms, and I do not gather that on this point the other noble Lords differed from him. The appellants, however, as I have said, based their contention on the view that the relevant sections form a code. They admit the original liability of the company to construct the approaches, the bridge and the road. This liability must be derived from the statement in sect. 31 that the road is "to be carried" at the expense of the company by means of a bridge.

Further, they admit their continuing liability to repair and maintain both approaches and bridge. This liability is to be inferred from a continuing obligation to carry the road by means of a bridge. They seek, however, to discriminate between the road or the surface of the road and the approaches and bridge, and that without any words whatever which would justify such a discrimination. I can see no ground for such a discrimination in the present circumstances. Sect. 31 must be read in connexion with sect. 35. The bridge is to be one for the purpose of carrying a public carriage road and at all times it is to be "continued" of a defined width. The bridge, therefore, is to be a means of transit for carriages, and in my opinion, the railway company would not be maintaining the bridge in the true sense of that word if the substructure

were sound but the road were to be so founderous as to be impassable. That view derives great force from the decision of this House in the case of *Lancashire & Yorkshire Railway Company* v. *Bury* (3). The section which fell to be construed in that case was the Railway Clauses Consolidation Act, 1845, s. 46. I find in the speech of LORD HERSCHELL very strong confirmation of the view that a road over a bridge is naturally spoken of and considered as part of the bridge and that an obligation to maintain a bridge contained in such an Act as we are now considering, whether it is express or implied, would naturally extend to the road without which the bridge itself would be useless.

My Lords, the conclusion at which I have arrived is the same as that which PARKER, J., COZENS HARDY, M.R., and BUCKLEY and KENNEDY, L.JJ., reached with unanimity in the case of *Attorney-General* v. *Midland Railway Company* (1). Speaking for myself, I prefer the way in which PARKER, J., stated the grounds for his decision in a considered judgment. I see no reason for thinking that the learned judge placed too much weight on sect. 73 and too little on sect. 70 (the sections equivalent to sects. 31 and 35 in the present case). He was, I think, rightly treating the relevant sections as a code, and therefore as sections to be construed together.

For those reasons I concur in the opinion that this appeal fails.

Solicitors: *I. B. Pritchard* (for the appellants); *Lambert & Hale*, agents for *Hubert G. Thornley*, Northallerton (for the respondents).

[*Reported by* S. G. G. EDGAR, ESQ., *Barrister-at-Law.*]

ANDRE PAUL TERENCE AMBARD *v.* THE ATTORNEY-GENERAL OF TRINIDAD AND TOBAGO.

[Privy Council (Lord Atkin, Lord Maugham and Sir Sidney Rowlatt),
March 2, 1936.]

Privy Council—Practice—Appeal—Contempt of court—Court of record. Contempt of court—Publication of criticism of the administration of justice—Imputation—Improper motives—Liberty of the press.

A newspaper published an article commenting on the inequality of sentences, citing as examples two sentences at the local sessions in charges of intent to murder but expressly disclaimed the suggestion that one of the judges was habitually severe, the other habitually lenient :

Held : (i) it is the ordinary right of members of the public or the press to criticise in good faith in private or public the public administration of justice.

(ii) to justify a committal for contempt of court, there must be evidence in the article itself taken as a whole, that the publisher has acted with untruth or malice, or that he imputed improper motives to those taking part in the administration of justice.

On a preliminary objection raised by the respondent as to the competency of the appeal :—

Held : it is competent to His Majesty in Council to give leave to appeal and to entertain appeals against orders of courts of record overseas imposing penalties for contempt of court.

[**EDITORIAL NOTE.** It has long been the policy in England to allow a wide latitude to criticism of the administration of justice. What is done in public should be freely debated in public provided the criticism is not actuated by malice or intended to impair the administration of justice. In places where the population consists largely of uncivilised or only partly civilised races it may be necessary to take a stricter view of what criticism may be allowed, but any restriction, it is here said, should be the exception, and the administration of justice must suffer the respectful though outspoken comments of ordinary men. This case also decides the question whether an appeal will lie to His Majesty in Council against an order of a court of record overseas imposing a penalty for contempt of court.

For a Statement of the Law and Practice, see HALSBURY, Hailsham Edn., Vol. 7, p. 7, para. 9 ; and for the Cases, see DIGEST, Vol. 10, pp. 20-22, Nos. 152-168 ; and as to Appeals from Overseas, see HALSBURY, Hailsham Edn., Vol. 11, p. 216, para. 419 ; and for the Cases, see DIGEST, Vol. 17, pp. 478, 479, Nos. 412-430.]

Cases referred to :

(1) *Rainy* v. *Sierra Leone JJ.* (1853), 8 Moo. P.C.C. 47 ; 17 Digest 479, *426.*
(2) *McDermott* v. *British Guiana Judges* (1868), L.R. 2 P.C. 341 ; 17 Digest 479, *423.*
(3) *Surendranath Banerjea* v. *Bengal High Court Chief Justice and Judges* (1883), L. R. 10 Ind. App. 171 ; 17 Digest 479, *424.*
(4) *McLeod* v. *St. Aubyn*, [1899] A.C. 549 ; 16 Digest 20, *152.*
(5) *R.* v. *Gray*, [1900] 2 Q.B. 36 ; 16 Digest 21, *166.*
(6) *Re Ready and Huggonson* (1742), 2 Atk. 469 ; 16 Digest 6, *1.*

Appeal by special leave from the judgment of the Supreme Court of Trinidad and Tobago, dated Sept. 5, 1934, whereby the appellant was

convicted of contempt of court and ordered to pay a fine of £25 or in default to be imprisoned for one month and to pay the respondent's costs to be taxed as between solicitor and client.

F. P. M. Schiller, K.C., and *Kenelm Preedy*, for the appellant.

Edward W. Cave, K.C., and *Richard A. Willes*, for the respondent.

The facts are fully set out in the judgment of their Lordships delivered by LORD ATKIN.

LORD ATKIN: This is an appeal by special leave from an order of the Supreme Court of Trinidad and Tobago ordering the appellant to pay a fine of £25 or in default to be imprisoned for one month for contempt of court, and further ordering him to pay the costs of the proceedings as between solicitor and client.

The first question that arises is whether as contended by the respondent the Privy Council is incompetent to entertain an appeal from an order of a court of record inflicting a penalty for contempt of court. The decisions on the point are conflicting. In *Rainy* v. *Justices of Sierra Leone* (1), a Board consisting of LORD CRANWORTH, KNIGHT BRUCE, L.J., DR. LUSHINGTON and SIR EDWARD RYAN undoubtedly decided that no such appeal lay. LORD CRANWORTH, in giving the judgment of the Board, after pointing out that in this country every court of record is the sole and exclusive judge of what amounts to a contempt of court proceeded:

> We are of opinion, that it is a court of record, and that the law must be considered the same there as in this country; and, therefore, that the orders made by the court in the exercise of its discretion, imposing these fines for contempts, are conclusive, and cannot be questioned by another court; and we do not consider that there is any remedy by petition to the Judicial Committee to review the propriety of such orders.

The argument, with respect, is not convincing, for it would seem to apply equally to all decisions in criminal cases which at that time in both this country and the colony were conclusive and could not be questioned by any court. In *McDermott* v. *Chief Justice of British Guiana* (2), leave to appeal from a committal for contempt had been given "without prejudice to the competency of Her Majesty to entertain an appeal." At the hearing the Board, consisting of LORD CHELMSFORD, WOOD, L.J., SIR JAMES COLVILE and SIR E. VAUGHAN WILLIAMS, treated the hearing as a motion to revoke the leave. An incidental question was whether the court that imposed the penalty was a court of record and in giving the judgment of the Board LORD CHELMSFORD said that the applicant had to show either that the court was not a court of record or that if it was, yet there was something in the order which rendered it improper and therefore the subject of appeal. He proceeded to say at page 363:

> Not a single case is to be found where there has been a committal by one of the

colonial courts for contempt, where it appeared clearly upon the face of the order that the party had committed a contempt, that he had been duly summoned, and that the punishment awarded for the contempt was an appropriate one, in which this Committee has ever entertained an appeal against an order of this description.

It would appear to their Lordships that the grounds of decision assume that jurisdiction exists at any rate in cases where it does not appear on the face of the order that the party had committed a contempt, etc. Whether this means that if the order merely recited that a contempt had been committed without more the Board would examine the alleged contempt is not clear. But in *Surendranath Banerjea* v. *Chief Justice of Bengal* (3), on an appeal from a committal for contempt by the High Court in Calcutta, the Board examined the written article which was complained of and said that it was clearly a contempt of court. They set out the passage which has just been quoted, and proceed at page 179 :

> Their Lordships having decided that the libel was a contempt of court, and that the High Court had jurisdiction to commit the petitioner for a period of two months, the case is not a proper one for an appeal to Her Majesty.

This decision is difficult to reconcile with the doctrine that found favour in *Rainy's* case (1), that the colonial court is sole judge of what constitutes a contempt, and that there is no remedy by way of appeal to His Majesty in Council to review the propriety of such orders.

However, in 1899, in the case of *McLeod* v. *St. Aubyn* (4), the Judicial Committee entertained an appeal from an order committing for contempt and allowed the appeal with costs against the respondent. The point that there was no jurisdiction to entertain such an appeal was not taken, but it seems unlikely that if it were a good point it should not have occurred to counsel or to any of the members of the Board before whom the case came at different stages. The Board in this case quite plainly assumed jurisdiction and their Lordships respectfully agree with their view. There seems no reason for limiting in this respect the general prerogative of the Crown to review all judicial decisions of courts of record in the dominions overseas whether civil or criminal : though the discretion as to the exercise of the prerogative may have to be very carefully guarded. It should be noticed that the Order in Council of 1909 dealing with the jurisdiction of the Supreme Court of Trinidad and Tobago, S. R. & O. 1909, page 854, imposes no limit other than pecuniary as to the orders, decisions, etc., of the Supreme Court from which there may be an appeal : and it would appear from it that the Supreme Court itself could have granted leave to appeal to the Privy Council from this order in the present case. But apart from any question of this kind their Lordships come clearly to the conclusion that it is competent to His Majesty in Council to give leave to appeal and to entertain appeals against orders of the courts overseas imposing penalties for contempt of court. In such cases the discretionary power of the

Board will no doubt be exercised with great care. Everyone will recognise the importance of maintaining the authority of the courts in restraining and punishing interferences with the administration of justice, whether they be interferences in particular civil or criminal cases or take the form of attempts to depreciate the authority of the courts themselves. It is sufficient to say that such interferences when they amount to contempt of court are *quasi*-criminal acts, and orders punishing them should, generally speaking, be treated as orders in criminal cases, and leave to appeal against them should only be granted on the well-known principles on which leave to appeal in criminal cases is given.

On these principles their Lordships proceed to examine the complaint made in this case. In June, 1934, one, Joseph St. Clair, was charged at the sessions, Port of Spain, before GILCHRIST, J., and a jury, on an indictment containing two counts, one charging the accused with attempt to murder a superior officer, the second with shooting with intent to do grievous bodily harm. It appears that the accused fired his rifle at the officer but failed to hit him. He was found guilty on the second count with a recommendation to mercy and was sentenced on June 12 to eight years' hard labour. He did not appeal.

At the same sessions, one, John Sheriff, was charged before ROBINSON, J., and a jury, on an indictment containing three counts: (1) wounding with intent to murder a particular woman; (2) wounding with intent to murder generally; (3) wounding with intent to do grievous bodily harm. It appears that he attacked with a razor and seriously mutilated a woman who was not the person he had intended to attack. He was convicted on the third count and was sentenced on June 14 to seven years' hard labour. After sentence he said, "I give notice of appeal," and on June 20 filed formal notice of appeal against his conviction. His appeal eventually succeeded apparently on the ground of mis-direction and the conviction was quashed. Meanwhile on June 29 the present appellant, who is the editor-manager and part proprietor of a daily newspaper called *The Port of Spain Gazette*, published the article which has been found to constitute a contempt of court. He did not write it but revised it editorially before publication and undoubtedly is fully responsible for its publication. It is necessary for the purposes of this case to consider the whole article. [The article was then read.]

On July 3, the Attorney-General gave notice of motion to the registrar of the Supreme Court that he would move for an order *nisi* calling upon the appellant to show cause why a writ of attachment should not issue against him for his contempt in publishing the article in question and on the same date an order *nisi* was made by the court in the terms of the notice of motion. The notice and the order *nisi* at first were limited to contempt in publishing an article calculated to interfere with the

due course of justice the complaint being that it was improper having regard to Sheriff's pending appeal. Later it was amended so as to include a complaint that the article contained " statements and comments which tend to bring the authority and administration of the law into disrepute and disregard." In this amended form the matter came before the full court, consisting of the Chief Justice and Gilchrist and Robinson, JJ. It was heard on various days in July, and on Sept. 5, the Chief Justice gave the judgment of the court. He acquitted the appellant of contempt in respect of the pending appeal of Sheriff : and no more need be said on that point. But he found that the article was written with the direct object of bringing the administration of the criminal law by the judges into disfavour with the public, and desiring to impose a penalty which if relatively light would yet emphasise that, while the judges would place no obstruction in the way of fair criticism of their performance of their functions, untruths and malice would not be tolerated, he fined the respondent £25, in default one month's imprisonment, and ordered him to pay the costs of the proceedings to be taxed between solicitor and client. The formal judgment, slightly departing from the wording of the oral judgment recited that the appellant had committed a contempt of court, the article having been written " with the direct object of bringing the administration of the criminal law in this colony by the judges into disrepute and disregard " so following the amended order *nisi*.

Their Lordships can find no evidence in the article or any facts placed before the court to justify the finding either that the article was written with the direct object mentioned or that it could have that effect : and they will advise His Majesty that this appeal be allowed. It will be sufficient to apply the law as laid down in *R.* v. *Gray* (5), by Lord Russell of Killowen, L.C.J., at page 40 :

> Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court. The former class belongs to the category which Lord Hardwicke, L.C., characterised as " scandalising a court or a judge." (*Re Read and Huggonson* (6).) That description of that class of contempt is to be taken subject to one and an important qualification. Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court.

And that in applying the law the Board will not lose sight of local conditions is made clear in the judgment in *McLeod* v. *St. Aubyn* (4) where Lord Morris, after saying that committals for contempt of court by scandalising the court itself had become obsolete in this country, an

observation sadly disproved the next year in the case last cited, proceeds :

> Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of court for attacks on the court may be absolutely necessary to preserve in such a community the dignity of and respect for the court.

But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way : the wrong headed are permitted to err therein : provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue : she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.

In the present case the writer had taken for his theme the perennial topic of inequality of sentences under the text "The Human Element," using as the occasion for his article the two sentences referred to. He expressly disclaimed the suggestion that one of the particular judges was habitually severe, the other habitually lenient. It is unnecessary to discuss whether his criticism of the sentences was well founded. It is very seldom that the observer has the means of ascertaining all the circumstances which weigh with an experienced judge in awarding sentence. Sentences are unequal because the conditions in which offences are committed are unequal. The writer is, however, perfectly justified in pointing out what is obvious that sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is quite inevitable. Some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences ; others equally conscientious have thought it their duty to view the same crimes with leniency. If to say that the human element enters into the awarding of punishment be contempt of court, it is to be feared that few in or out of the profession would escape. If the writer had as journalist said that St. Clair's sentence was, in his opinion, too severe ; and on another occasion that Sheriff's sentence was too lenient, no complaint could possibly be made ; and the offence does not become apparent when the two are contrasted. The writer in seeking his remedy, as has been remarked by the Supreme Court, has ignored the Court of Criminal Appeal : but he might reply that till such a court has power on the initiative of the prosecution to increase too lenient sentences

its effect in standardising sentences is not completely adequate. It appears to their Lordships that the writer receives less than justice from the Supreme Court in having untruths imputed to him as a ground for finding the article to be in contempt of court. He has correctly stated both offenders to have been charged with intent to murder: and though he has subsequently inaccurately stated that the conviction of both affirmed that intent, yet seeing that both were convicted of the same intent, viz., to do grievous bodily harm, the reasoning as to unevenness of sentence appears to have been unaffected. And it seems of little moment that the writer thought that this sentence might be for life instead of in fact being for fifteen years. If criticism of decisions could only safely be made by persons who accurately knew the relevant law, who would be protected? There is no suggestion that the law was intentionally mis-stated.

Their Lordships have discussed this case at some length because in one aspect it concerns the liberty of the press which is no more than the liberty of any member of the public to criticise temperately and fairly but freely any episode in the administration of justice. They have come to the conclusion that there is no evidence upon which the court could find that the appellant has exceeded this right, or that he acted with untruth or malice, or with the direct object of bringing the administration of justice into disrepute. They are satisfied that the Supreme Court took the course they did with a desire to uphold the dignity and authority of the law as administered in Trinidad; there nevertheless seems to their Lordships to have been a misconception of the doctrine of contempt of court as applied to public criticism. A jurisdiction of a very necessary and useful kind was applied in a case to which it was not properly applicable, and this in the view of their Lordships has resulted in a substantial miscarriage of justice. Acting, therefore, on the principles enumerated in the first part of this judgment as applicable to appeals from convictions for contempt of court, their Lordships will humbly advise His Majesty that this appeal be allowed and that the order of the Supreme Court dated Sept. 5, 1934, be set aside. The respondent must pay the costs here and in the court below.

Solicitors: *Maples, Teesdale & Co.* (for the appellant); *Burchells* (for the respondent).

[*Reported by* S. P. Khambatta, Esq., *Barrister-at-Law.*]

Re MARTIN'S PATENTS.

[CHANCERY DIVISION (Bennett, J.), **March 25, 1936.**]

Patents—Petition for revocation—Particulars of prior user—Earliest and latest dates—R.S.C. Ord. 53 (*a*), r. 16.

In a petition for the revocation of two patents the petitioner alleged that the patents were invalid by reason, *inter alia*, of prior public user, and that neither applicant was the true and first inventor. In the particulars of objections sundry instances of prior public user were given :—

HELD : the respondents are entitled under R.S.C. Ord. 53 (*a*), r. 16, to particulars giving the earliest and latest dates of each alleged prior public user, distinguishing between manufacture, sale, demonstration and use.

[**EDITORIAL NOTE.** The scope of particulars under this special order dealing with patent actions is not the subject of a great deal of authority. The rule is a strict one intended to ensure that patentees shall know the case they have to meet in respect of prior public user, and the present case decides that the "earliest and latest dates" in the rule apply to each alleged form of prior public user.

FOR R.S.C. ORD. 53(*a*), R. 16, see YEARLY SUPREME COURT PRACTICE, 1936, p. 1017, and FOR THE CASES, see DIGEST, Vol. 36, pp. 787-793, Nos. 2669-2746.]

Cases referred to :

(1) *Stroud* v. *Humber, Ltd.* (1906), 24 R.P.C. 141 ; 36 Digest 558, *238*.

(2) *British Thomson-Houston Co.* v. *Crompton Parkinson, Ltd.* (1935), 52 R.P.C. 409 ; Digest Supp.

(3) *Avery, Ltd.* v. *Ashworth, Son & Co., Ltd.* (1915), 32 R.P.C. 560 36 Digest 803, *2861*.

(4) *Re G. A. Smith's Patent* (1912), 29 R.P.C. 339.

(5) *Soapless Foam, Ltd.* v. *Physical Treatment Institutes, Ltd.* (1935), 52 R.P.C. 256 ; Digest Supp.

PROCEDURE SUMMONS for further and better particulars of prior public user.

Letters patent (Nos. 353,108 and 353,334) were granted to Percy Martin and The Daimler Co., Ltd., for inventions in respect of "Improvements in or relating to Power Transmission Mechanism and Variable Speed Gearing." A petition for revocation was presented on July 23, 1935, by Harold Sinclair, the respondents being the grantees of the patents. The petition alleged that the patents were invalid by reason of the matters appearing in the particulars of objection. The particulars of objections alleged (*inter alia*) that the inventions were not new inasmuch as they had been published in the United Kingdom prior to the date of the patents by public user, that on the day before the patents were applied for an article appeared in *The Times* describing the subject matter of the patents and that neither grantee was the first and true inventor. The particulars of one alleged prior public user were :—

By the manufacture, sale, demonstration and public use by the respondents

The Daimler Company Limited and the use by Daimler Hire Limited and by members of the public including the author of the said article in *The Times* newspaper in the United Kingdom of motor cars similar to that described in the said article prior to the date of the said letters patent. The petitioner cannot give further particulars hereunder until after discovery.

On Oct. 22, 1935, an order for directions was made, *inter alia* that the petitioner should give to the respondents further and better particulars of the allegation that neither grantee was the first and true inventor. On Nov. 5, 1935, the petitioner's solicitors wrote to the respondents' solicitors and said "If there is any invention in either Letters Patent No. 353,108 or Letters Patent No. 353,334, which is denied, the first and true inventor or inventors thereof were the petitioner and/or Mr. L. H. Pomeroy of the respondents The Daimler Hire Co., Ltd."

On Feb. 10, 1936, the petitioner made application for leave to administer interrogatories; on Feb. 17, 1936, the respondents applied for further and better particulars of the particulars of objection; both these applications were adjourned into court and came on for hearing, together with a third application by the respondents to extend the time for filing further and better affidavit of documents until some date after delivery of the further particulars of the particulars of objections.

Trevor Watson, *K.C.*, and *Basil Drewe* for the respondents: R.S.C. Ord. 53(*a*), r. 16, is very stringent and the procedure must be followed strictly. Each prior user alleged must be identified. Unless it was done in the ordinary course of business the respondents are entitled to be given the earliest and latest dates of each alleged prior user. With regard to the plea that neither respondent was the first and true inventor, this plea now means that the grantees obtained the invention from someone else. The letter of Nov. 5 leaves three possible alternatives; the respondents are entitled to know which alternative the petitioner is alleging. [Counsel referred to *Stroud* v. *Humber, Ltd.* (1), *British Thomson-Houston Co.* v. *Crompton Parkinson, Ltd.* (2), *Avery, Ltd.* v. *Ashworth, Son & Co., Ltd.* (3), *Re G. A. Smith's Patent* (4).]

Sir Stafford Cripps, *K.C.*, and *Guy Aldous* for the petitioner: R.S.C. Ord. 53(*a*), r. 16, must be complied with; the question is when? Can the petitioner give the rest of the particulars after discovery? The position here is the same as in *Soapless Foam, Ltd.* v. *Physical Treatment Institutes, Ltd.* (5). The rule is not imperative before discovery. After discovery the petitioner can give dates.

Trevor Watson, *K.C.*: The respondents are being attacked; they are entitled to know what the case against them is. It is illegitimate to make a general allegation, relying upon what may be discovered upon discovery, and then to amend. The object of this application is to obtain inspection of the respondents' books.

Sir Stafford Cripps, *K.C.*: With regard to the plea of obtaining, it

is impossible to give the date an invention is made. If an invention is the result of discussion it is hard to say who the inventor is. The petitioner is now prepared to strike out the name of Mr. Pomeroy.

BENNETT, J.: The respondents have not been given the particulars to which they are entitled under the rule. They are entitled to know the earliest and latest dates which are alleged. There must be an order that the petitioner give further and better particulars (a) of dates within which it is alleged that The Daimler Co., Ltd. (1) manufactured, (2) sold, (3) demonstrated, and (4) used in public cars similar to the one described in the article in *The Times*; and (b) with respect to the Daimler Hire Co., of the dates within which it is alleged that they used the invention.

The other particulars of public user must be struck out.

The application for leave to administer interrogatories will be adjourned until after discovery. The time for filing a further and better affidavit of documents will be extended for 10 days. The costs of these applications will be costs in the action.

Solicitors: *Boyce, Evans & Sheppard* (for the petitioner); *Andrew, Purves, Sutton & Creery*, agents for *R. A. Rotherham & Co.*, Coventry (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

DOROTHY MARGARET CATHERINE HULME-KING *v.* HENRY PETER CHRISTOPHER DE SILVA.

[PRIVY COUNCIL (Lord Atkin, Lord Maugham and Sir Sidney Rowlatt), **February 27, 1936.**]

Divorce—Compromise—Withdrawal of opposition to application for decree absolute.

A husband, the respondent, obtained a decree *nisi* for divorce from his wife, the appellant. There being nothing in law or in practice in Ceylon to prevent an application for a decree absolute being made by the guilty spouse, the appellant duly made an application which was opposed by the respondent. The appellant then agreed to pay to the respondent a monthly allowance in consideration, *inter alia*, of the withdrawal of his opposition to the appellant's application. The appellant defaulted in payment of the allowance, and the respondent brought an action to recover the amount due:—

HELD: (i) there was nothing in the agreement or in the circumstances under which it was entered into which would justify the court in holding that it had any improper object or purpose or that it was in any way contrary to public policy.

(ii) there was nothing in sect. 5 of Ordinance 8 of 1923, borrowed from the English Married Women's Property Act, 1882, s.1, to prevent a wife from disposing of her movable or immovable property in favour of her husband, and the amounts due under the agreement were recoverable.

[**EDITORIAL NOTE.** The courts do not encourage agreements which tend to oust their jurisdiction and a case with which this may usefully be compared is

Hyman v. *Hyman*, [1929] A.C. 601. There a covenant in a deed was relied on to prevent an application to the court and it was held that it was impossible for the wife by covenant to preclude the court from the exercise of its jurisdiction, especially where the jurisdiction was conferred in the interests of the public. The agreement here, however, was to withdraw opposition to an application and a different result was arrived at.

For the Effect of such a Covenant, see HALSBURY, Hailsham Edn., Vol. 10, p. 793, para. 1,257; and for Cases, see DIGEST, Vol. 27, pp. 237, 238, Nos. 2,083-2,089.]

Case referred to:

(1) *Soysa* v. *Soysa* (1916), 19 New L.R. 146 (Ceylon).

Appeal from a decree of the Supreme Court of the Island of Ceylon, dated Mar. 28, 1934, affirming a decree of the District Court of Colombo, dated April 5, 1933, in favour of the plaintiff in an action for the recovery of certain sums due under an agreement dated Feb. 4, 1926, together with interest thereon.

L. M. de Silva, K.C., and *H. I. P. Hallett*, for the appellant.

Stephen Chapman for the respondent.

The facts appear from the judgment of their Lordships delivered by Lord Maugham.

Lord Maugham: This is an appeal from a decree of the Supreme Court of the Island of Ceylon, dated Mar. 28, 1934, affirming a decree of the District Court of Colombo, dated Apr. 5, 1933. The action was one in which the respondent was the plaintiff and the appellant was the defendant. The respondent was the husband of the appellant until the decree absolute pronounced by the Supreme Court on May 18, 1926, in certain divorce proceedings brought at the instance of the respondent.

The action which led to the present appeal was commenced by the respondent by plaint dated May 11, 1932, in which the respondent claimed from the appellant a sum of Rs.12,118 under and by virtue of an agreement No. 326 dated Feb. 4, 1926, and a mortgage bond No. 329 dated Feb. 18, 1926. Of the sum named Rs.11,500 were arrears of monthly payments due from the appellant to the respondent by virtue of the said instruments. The balance claimed was for interest. The circumstances under which the said instruments were entered into are not in dispute. The parties were married on May 10, 1915. On Dec. 15, 1924, the respondent in an action in the District Court of Colombo No. 10899 obtained a decree *nisi* for divorce against his wife, the first defendant. By that decree the respondent further obtained under the Civil Procedure Code of Ceylon, s. 617, a direction that a settlement be made out of the property of the appellant to secure to the respondent a monthly income of Rs.1,000. There was a second defendant, Mr. Lister Hulme-King, a person with whom the appellant was alleged to have committed adultery, who was ordered to pay to the respondent Rs.10,000 as damages. From the said decree of Dec. 15, 1924, all the parties

appealed. The issue of adultery was, however, no longer contested on such appeal. On Oct. 27, 1925, the Supreme Court by its judgment varied the decree of the District Court by reducing the damages payable by the second defendant to the sum of Rs.2,500 and by reducing the monthly income to be secured by the settlement to the respondent to the sum of Rs.400. On Nov. 30, 1925, the respondent, who was dissatisfied with the reduced monthly income secured to him, obtained from the Supreme Court conditional leave to appeal to His Majesty in Council against the last-mentioned judgment and final leave to appeal was granted on Feb. 2, 1926. Previously to that date, namely, on Nov. 6, 1925, the appellant applied by motion in the District Court of Colombo that the decree *nisi* of divorce dated Dec. 15, 1924, be made absolute, in accordance with the Civil Procedure Code, ss. 604 and 605. The respondent objected to this course on the footing of his proposed appeal to His Majesty in Council, and the District Judge on Nov. 10, 1925, declined to make the decree absolute. The appellant filed a petition of appeal to the Supreme Court against that order. It was at this stage that the disputes between the appellant and the respondent were compromised by the agreement No. 326.

The agreement was made at Colombo on Feb. 4, 1926, between the respondent and the appellant and it is notarially attested. It recites the marriage of the parties on May 10, 1915, the proceedings in divorce in the District Court of Colombo, and the order made thereon, the appeal to the Supreme Court, the order of the Supreme Court, the application by the present respondent for leave to appeal to His Majesty in Council, and that the respondent and the appellant had agreed to effect a compromise regarding the monthly allowance payable to the respondent and to settle all matters and disputes between them. By clause 1 the appellant agreed to pay to the respondent Rs.750 per month commencing on Jan. 1, 1926, and to execute as security for such payment a primary mortgage of certain property belonging to the appellant. By clause 2 the appellant agreed to pay to the respondent Rs.6,000 in full settlement of the monthly allowance due to him up to Dec. 31, 1925. By clause 3 the respondent agreed to pay to the appellant her taxed costs of appeal in the original action. By clause 4 he agreed to withdraw his appeal in another action between the parties. By clause 5 the respondent agreed to renounce his right to any movable property of the appellant. By clause 6 he agreed to consent to the appeal of the appellant against the order of the District Court dated Nov. 10, 1925, being allowed, the parties bearing their own costs; and by clause 7 he agreed not to prosecute his appeal to His Majesty in Council against the judgment of the Supreme Court so far as it affected the appellant. Clause 8 gave the respondent the right in the event of default by the appellant in payment of the monthly pay-

ments to apply to the District Court for the appointment of a receiver. On Feb. 18, 1926, the mortgage bond No. 329 was executed by the attorney for the appellant in compliance with clause 1 of the agreement.

On May 18, 1926, the Supreme Court gave judgment in the appellant's appeal against the order of the District Court dated Nov. 10, 1925, refusing the decree absolute. The respondent by his counsel consented to the appeal being allowed, in other words, consented to the application by the appellant to have the decree made absolute. The Supreme Court dealt with the appeal to the Privy Council and stated that the question as to whether or not the marriage should be dissolved was no longer in issue. Garvin, J., further observed as follows :—

> That appeal cannot in any way affect the question of the dissolution of the marriage between the parties. The provisions relating to matrimonial actions seem to indicate that in the case of an action for a dissolution of marriage the order directing such marriage to be dissolved should be embodied in a decree *nisi*. At the expiration of three months in the absence of any objection, the court is required to make the decree so entered absolute.

He concluded by saying that he saw no reason why the decree *nisi* should not be declared absolute. The decree absolute was made.

After the said judgment and order of the Supreme Court the appellant married Mr. Lister Hulme-King, the second defendant above referred to. She paid to the respondent, who had complied with all his obligations under the agreement, the monthly sums of Rs.750 up to Dec., 1930, and Rs.500 out of the allowance for the month of Jan., 1931 ; but she thereafter refused to make any payment to the respondent, and this action was accordingly commenced to recover the amount of such monthly payments as were in default, together with interest. On Apr. 5, 1933, the District Judge decided the various points which had been raised by the appellant in a sense favourable to the respondent, and granted him a decree for the relief he claimed. He also dismissed the claim of the appellant in reconvention, a claim by the appellant to recover sums already paid by her under the agreement No. 326. It may be stated here that counsel for the appellant did not dispute this part of the case, and their Lordships need not further refer to it. The appellant appealed to the Supreme Court, who on Mar. 28, 1934, delivered their judgment. In that appeal the appellant relied on three contentions substantially those on which he relied before their Lordships. The learned judges, consisting of Garvin, Senior Puisne Judge, and Poyser, J., unanimously decided against the contentions raised on behalf of the appellant and dismissed the appeal. It is from that decision that the appellant has appealed to His Majesty in Council.

Three points were taken by the appellant before their Lordships. First, it was said that the agreement No. 326 and the bond No. 329 executed in pursuance thereof were void as being contrary to public

policy. Secondly, it was argued that the said agreement, having been entered into before the decree absolute and therefore whilst the relation of husband and wife still subsisted between the parties and without the sanction of the court was unenforceable under the law of Ceylon. Thirdly, it was contended that the agreement was an "adjustment" of a decree within the meaning of the Civil Procedure Code, s. 349, and not having been certified to the court whose duty it was to execute the decree could not be recognised by any court, and therefore could not be made the basis of an action.

The first point appears to be based on the suggestion that the agreement No. 326 amounted in substance to a bargain for the sale of the decree absolute, or, more accurately, amounted to an agreement by the husband for a pecuniary consideration not to oppose an application by the wife for an order that the decree *nisi* should be made absolute. If the suggestion were well founded in fact the point would no doubt call for careful consideration; but in the view of their Lordships it is not. A number of English authorities were referred to, but the law of Ceylon in regard to making a decree absolute rests on the Civil Procedure Code, s. 605, and differs in an important respect from the English law and well settled practice. The application in England can only be made by the innocent party. In Ceylon the relevant section is in these terms:—

> 605. Whenever a decree *nisi* has been made and no sufficient cause has been shown why the same should not be made absolute as in the last preceding section provided within the time therein limited, such decree shall on the expiration of such time be made absolute.

If the conditions have been complied with (i.e., if no cause has been shown and the time fixed has elapsed) the court is bound to make the decree absolute, and it has been held that in Ceylon there is nothing either in the law or the practice to prevent the application being made by the innocent or by the guilty spouse. Their Lordships see no reason for differing from this view and indeed they were not invited to hold the contrary. The conclusion is inevitable that all that the innocent husband agreed to do as regards the decree absolute was to abandon an appeal to the Privy Council and not to oppose an application by the wife, the result of which was in the circumstances inevitable. The language used by Chief Puisne Judge GARVIN in delivering judgment aptly describes the position:—

> It is not suggested that even at the date of this agreement there was any fact or circumstance which should in the interests of justice have been brought to the notice of the court which had been suppressed or that the parties had agreed to suppress any such facts. . . . Now there is *not* the slightest suggestion of any collusion or even impropriety in regard to the institution of these proceedings or their conduct up to the time of decree *nisi* and until its confirmation by the Supreme

Court. And moreover there is not even a suggestion that there was any collusion for any improper purpose at the time this agreement was entered into. In consenting not to oppose the appeal from the order made by District Court upon the defendant's application for a decree absolute the plaintiff was only doing indirectly that which he was entitled to do himself. . . . Since the defendant had already herself taken steps to that end I can see no impropriety in the plaintiff consenting that such a decree should be entered.

Their Lordships have no difficulty in agreeing with the Supreme Court that there was nothing in the agreement or in the circumstances under which it was entered into which would justify the court in holding that it had any improper object or purpose or that it was in any way contrary to public policy.

The second point may also be concisely dealt with. Their Lordships accept the view that prior to the decree absolute the relation of husband and wife existed between the appellant and the respondent. Whatever may have been the capacity of a wife in Ceylon prior to the year 1923 as regards a disposition, transfer or settlement of movable or immovable property in favour of her husband, their Lordships can see no reason for doubting that under sect. 5 of Ordinance 18 of 1923 a wife is under no disability as regards coverture in disposing of her movable or immovable property in favour of her husband. Sect. 5 of the Ordinance (borrowed, as will be seen, from the Married Women's Property Act, 1882, s. 1) is in these terms :—

> (1) A married woman shall, in accordance with the provisions of this Ordinance, be capable of . . . disposing by will or otherwise of any movable or immovable property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.
>
> (2) A married woman shall be capable of entering into, and rendering herself liable in respect of and to the extent of her separate property on, any contract, and . . . of being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*.

There is nothing in this section or in the Ordinance or in the Roman-Dutch law which justifies an exception from the generality of the provisions of transactions between spouses. It may be observed, by way of illustration, that dispositions between husband and wife were illegal at common law in England before Jan. 1, 1883, but made legal by sect. 1 of that Act by words not distinguishable as regards their effect from sect. 5 of the Ordinance. Their Lordships feel a difficulty in relying on the decision of the Board in *Soysa* v. *Soysa* (1), since that case was based on sect. 13 of Ordinance No. 15 of 1876, which was repealed by sect. 4 of Ordinance 18 of 1923. The question, however, is now free from doubt under sect. 5 of that Ordinance, and this point plainly fails.

[Their Lordships then considered the third point relied upon by the appellant, which depended upon a true construction of the Civil Procedure Code of Ceylon, s. 349, and they decided that the section related only to decrees for the payment of money.]

Accepting, then, the view that the section relates only to decrees for the payment of money, a view sufficient for the purposes of the present appeal, their Lordships do not propose to deal with the other questions which arise on the construction of the section, merely observing that this is not to be taken as implying in any way an opinion adverse to that expressed in the Supreme Court in regard to them.

In order to preclude misconception their Lordships think it right to observe that in the above they have been dealing with only the section as it exists in the Civil Procedure Code of Ceylon and not with the corresponding section (sect. 258) of the Indian Civil Procedure Code, now embodied in Order 21, r. 2, of the First Schedule thereto. That rule has repeatedly been amended in some important respects and it is not now in the same form as the Ceylon section. It has been the main subject discussed in more than a hundred cases in the various courts of India with results that are by no means uniform. Their Lordships content themselves with saying that the conclusion at which they have arrived, namely, that sect. 349 of the Ceylon Code, relates only to decrees for the payment of money, agrees not only with the opinion expressed in the judgment under appeal, but also with the judgments of several of the courts in India pronounced before the words "of any kind" were added to the words "where any money payable under a decree."

In the result the appellant fails on all three of the points on which she relies. Their Lordships will humbly advise His Majesty to affirm the judgment appealed from and to dismiss this appeal with costs.

Solicitors: *O. A. Cayley* (for the appellant); *Freeman & Cooke* (for the respondent)

[*Reported by* S. P. KHAMBATTA, ESQ., *Barrister-at-Law.*]

P. CARTER (H.M. INSPECTOR OF TAXES) *v.* MRS. L. T. SHARON.

[King's Bench Division (Lawrence, J.), **March 19, 1936.**]

Income tax—Foreign possessions—New resident—Income from same source in previous year—Finance Act, 1926 (c.22) *s.*29 (1) (*b*) (*iv*)—*Meaning of "income"—Part of income transmitted to named person in England—Gift of such part complete in foreign country—Income Tax Act*, 1918 (c.40), *Sched. D, Case V, r.*2—*Miscellaneous Rules applicable to Sched. D, r.*1.

(i) The respondent was an American citizen not domiciled in the United Kingdom. In 1928, the respondent visited England but she did not acquire a "residence" for income tax purposes. During her visit the respondent received certain sums arising from shares in the United States. The respondent acquired a residence in England in 1929 :—

Held : under Finance Act, 1926, s. 29, the respondent was properly assessable for income tax in respect of the year 1929 on the sums received in 1928.

(ii) The respondent had for some years paid to her daughter in England a monthly allowance. This allowance was paid by the purchase by the respondent's agent on the respondent's banking account in the United States of a banker's draft on a London bank, which was posted to the daughter and payable to her order. Evidence was given that by the law of California, the gift of the allowance was complete at the very latest at the time of the posting of the banker's draft in California :—

Held : in as much as the gift of the sums paid as allowance was complete outside the United Kingdom, the sums were not sums which the respondent received or was entitled to receive within the Income Tax Act, 1918, Sched. D, Case V, r. 2, and the Miscellaneous Rules applicable to Schedule D, r. 1, and were not liable to tax.

Timpson's Executors v. *Yerbury*, [1936] 1 All E.R. 186 distinguished.

[EDITORIAL NOTE. The first point turns upon the construction of Finance Act, 1926, s. 29 (1) (*b*) (iv) and the short point is whether the word "income" there means merely income or "assessable income." The result is to affirm the proposition which is clearly expressed in the words of the footnote in HALSBURY, Hailsham Edn., Vol. 17, p. 191, thus : "Income in the case of a new resident is assessable on the basis of the income of the preceding year, where the new resident possessed the source in that year." Being a new resident in the year in question, it follows that in the preceding year there was no "assessable income" for want of residence. The proposition in the footnote is stated as a deduction from the case of *Back* v. *Whitlock*, [1932] 1 K.B. 747, and the learned judge here draws the same inference from that case.

The second point is of interest since the facts though similar to those in the recent case ot *Timpson's Executors* v. *Yerbury*, [1936] 1 All E.R. 186, lead to a different result. In both cases a parent in England was entitled to receive income from abroad and arranged for some part thereof to be received by a child or children in England. The distinction between the two cases is that upon the facts here the gift was complete abroad, whereas in the earlier case it was held that when the income reached England it was still income of the parent. In other words the gift in the earlier case was still revocable and not complete.

As to Finance Act, 1926, s. 29 (1) (*b*) (iv), see HALSBURY, Hailsham Edn., Vol. 17, p. 194, para. 396 ; as to Tax on Income Arising from Foreign Possessions, see HALSBURY, Hailsham Edn., Vol. 17, pp. 195-202, paras. 400-418, and for the Cases, see DIGEST, Vol. 28, pp. 79-81 and Supp.]

Cases referred to :

(1) *Fry* v. *Burma Corpn.*, [1930] A.C. 321 ; 15 Tax Cas. 113 ; Digest Supp.

(2) *Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493 ; 28 Digest 79, *433*.

(3) *Back* v. *Whitlock*, [1932] 1 K.B. 747 ; Digest Supp.

(4) *Astor* v. *Perry*, *Duncan's Executors* v. *Adamson*, [1935] A.C. 398 ; Digest Supp.

(5) *Timpson's Executors* v. *Yerbury*, [1936] 1 All E.R. 186 ; here referred to in pamphlet Nos. 830 and 845 of Tax Cases.

CASE stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The facts and arguments fully appear in the judgment.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills*, for the appellant.

J. M. Tucker, K.C., and *Terence Donovan*, for the respondent.

LAWRENCE, J. : The first question I have to decide in this case arises with reference to the construction of the Finance Act, 1926, s. 29, and it arises in these circumstances. The respondent is a lady who is an American subject not domiciled in the United Kingdom. For many years she has had an income arising from stocks and shares in the United States, and in the year 1919 she was in this country and she received a certain sum from those stocks and shares here. She was not in this country at that time long enough to acquire a residence for the purpose of the Income Tax Acts. She came again to this country in 1928 and again received in that year a certain sum from those securities, but again she was not resident sufficiently long to acquire a residence in the year 1928, but owing to ill-health she was unable to return to America and she did acquire a residence for the purpose of the Income Tax Acts in 1929. The issue between her and the Inland Revenue authorities is whether she is assessable by reference to the sum which she received from those securities in 1929, or by reference to the sum which she received in 1928, and that depends upon the construction of sect. 29 and the proviso thereto, or really upon the construction of the proviso. The proviso is :

> Provided that—(*b*) in the case of income tax chargeable under Case IV or Case V of Schedule D—

this is under Case V—

> (i) income tax shall be computed, as respects the year of assessment in which the income first arises, on the full amount of the income arising within that year :
>
> (ii) where the income first arose on some day in the year preceding the year of assessment other than April 6, income tax shall be computed on the income of the year of assessment.

I need not read (iii) because it refers to the income arising on the sixth day of April and it has not really any bearing upon this question.

> (iv) references in this proviso to income which arises or which arose shall, in

cases where income tax is to be computed by reference to the amount of income received in Great Britain or Northern Ireland, be construed as references to income which is or was so received.

That is the subsection which applies to this case, or which might apply to this case, because her income was only assessable by reference to the amount of income received in Great Britain. The question is whether, when those words in subsect. (iv) of sect. 29 (1) (*b*) are written in, as they must be written in, to subsect. (i) or the other subsections, the respondent is assessable by reference to what she received in 1929 or by what she received in 1928. That depends upon what is the income which she first received in Great Britain.

The Attorney-General's argument is that the words "income received in Great Britain" within the meaning of these subsections means income received by a person assessable to tax—chargeable to tax—and he says, therefore, that subsect. (i) applies, because it must be read in this way: "Income tax shall be computed as respects the year of assessment in which the income in respect of which the taxpayer was chargeable was first received in Great Britain on the full amount of the income arising within that year," and the first year in which the taxpayer received income in respect of which she was chargeable was 1929.

My attention was called by the Attorney-General and by Mr. Tucker, for the respondent, to the case of *Fry* v. *Burma Corporation* (1), where it was held on similar conditions with reference to a trade which had been set up within the period of three years that the setting up of the trade was referred to in the Income Tax Acts in the ordinary meaning of the words, and that the Income Tax Acts were not referring to a trade which produced taxable profits at the actual time at which the trade was set up. All the noble and learned Lords in the House of Lords dealt with the matter in the same way, and in particular on page 139 Lord Dunedin said this. He said there was an argument which could not be put aside lightly, which had been advanced by the Attorney-General, and he said that that argument depended upon the decision of the House in the well-known case of *Colquhoun* v. *Brooks* (2):

> Case I is: "Tax in respect of any trade not contained in any other Schedule." The case of *Colquhoun* v. *Brooks* (2) decided that, although the word "trade" is a word of ordinary significance and would include every trade, yet its meaning where it is mentioned in Case I means a trade that, partly at least, is exercised within the United Kingdom, and therefore the Attorney-General says the effect of *Colquhoun* v. *Brooks* (2) is that when you come to sub-rule (2) of Rule 1 of the Rules applicable to Cases I and II, the trade that has to be set up there is a taxable trade, a trade that under the decision of *Colquhoun* v. *Brooks* (2) could be taxed under Rule 1, and he says that taxable trade has only been set up for the first time when they altered its direction and took it from Burma and brought it to England. My Lords, there is a great deal in that contention, and I confess I was at first inclined rather to think the Attorney-General had made out his point, but, on further consideration, and certainly influenced by the fact that I know your two Lordships

who are to follow me are of this opinion, I have come to the conclusion that, after all, it is really safest in this case to go by the ordinary meaning of the words. There is no absolute necessity for saying that "trade" in this section (which has not anything to do with charging, but is only saying what is the method of computation that has to be taken) is to be pinned down to the exact meaning which it has under Case I, and it is safer to take the ordinary meaning of the word. If you take the ordinary meaning of the word, there is an end of the matter.

From that passage which formed the basis of his judgment and which was in agreement with the observations of LORD WARRINGTON and LORD ATKIN, what LORD DUNEDIN, as I understand, was saying was that in a similar section of the Income Tax Acts which sets up a basis of computation the words used must have their ordinary significance and that they did not import that the trade referred to was a taxable trade.

The same result was arrived at upon the very word "income" in sect. 29 (1) (*b*) by ROWLATT, J., in the case of *Back* v. *Whitlock* (3), in which he followed the *Burma Corporation* case (1). He said there that he could see no distinction between the *Burma Corporation* case (1), or at any rate that it governed the case which was then before him, and that the words in sect. 29 (1) (*b*) (i), "in which the income first arises" in that subsection did not mean in which the taxable income first arises, but in which the income although not taxable first arose, must be considered. In my view these two cases conclude the present case. I am unable to see how the word "income" in subsect. (iv) can be given a different meaning from that which is attached to it in the other subsections of sect. 29.

Some reliance was placed by the Attorney-General upon the case of *Astor* v. *Perry* (4). But, as Mr. Tucker pointed out what their Lordships were there considering was a charging section, and all that they were saying in that case was that when you are dealing with a charging section you must treat the charging section as dealing only with chargeable income. Here, as LORD DUNEDIN pointed out, you are not dealing with a charging section, you are dealing with a computing section, and there is, therefore, as he said, no ground for treating the words which are used as referring solely to chargeable income.

I am therefore of opinion that sect. 29 (1) (*b*) (i) and the other subsections of subsect. (*b*) have no application to this case at all, and that the tax must be assessed by reference to the year preceding the year of assessment in accordance with the main part of sect. 29, and not in accordance with the proviso, and therefore on that point I am in agreement with the opinion of the commissioners.

The second point arises upon a different state of facts and involves the consideration of the true construction of Rule 2 applicable to Case V and Miscellaneous Rules applicable to Schedule D, r. 1. The facts are that the taxpayer had since the year 1900 paid to her daughter a monthly allowance which her daughter received in America, or wherever

she happened to be, until 1909 when she married and came to England, and thereafter she received that allowance in England. It is now contended by the Crown that that monthly allowance is taxable under these rules as money arising from a foreign possession, from a possession out of the United Kingdom received in the United Kingdom, because the taxpayer came to reside in the United Kingdom in 1928 and remained there so as to become a taxpayer in 1929 under Case V. The way in which the allowance was paid to the daughter was by a Mr. F. T. Elsey, the financial agent of the taxpayer drawing, on the instructions of the taxpayer, upon a banking account of hers upon which he had authority to draw, and with the proceeds of that cheque purchasing from the American Trust Company in San Francisco a banker's draft, a cheque on Barclays Bank chief foreign branch in London, payable to the order of the daughter and then posting that banker's draft in San Francisco to the daughter in England. Upon that state of facts evidence was called before the commissioners as to the effect of that transaction according to American law, and the commissioners have found that under Californian law the property in the 4,000 dollars, the amount of the monthly allowance and the draft representing it, passed to the daughter and that the gift of the sum to her was complete and irrevocable at the very latest when the banker's draft was posted in California by Mr. F. T. Elsey.

The question I have to decide is whether in that state of facts the taxpayer is chargeable in respect of that sum of money as having been received in the United Kingdom within the meaning of Rule 2 applicable to Case V. My attention was called by both parties to the case of *Timpson's Executors* v. *Yerbury* (5). That is a case that came before the Court of Appeal, and I think I had better read the headnote for the purpose of exactitude. In the statement of facts :

> The deceased had several children—
>
> Mrs. Timpson was deceased at the time the case was heard—
>
> who were, with one exception, resident in the United Kingdom, and she directed the trustees to pay quarterly allowances to them out of her interest in the income of the trust. These allowances, throughout the material period, were remitted to the United Kingdom by bill of exchange drawn on London payable to the order of, and posted to, either the child or his or her bankers in the United Kingdom. All payments for the non-resident child were sent to his bank in London for his account. Upon the drawing of each bill of exchange the deceased's account with the trustees was debited with the equivalent in dollars of the sterling value of the bill.

What the Court of Appeal decided in that case was that the allowance or gifts to the deceased's children only became complete upon the receipt and encashment of those bills of exchange by the children, and that, therefore, at the time the income or the money came into the United

Kingdom it was income to which Mrs. Timpson was entitled. LORD WRIGHT, M.R., at page 3 of pamphlet No. 845 of Tax Cases went into the analysis of the legal position and he based his judgment upon that. I do not think it is necessary for me to read all the passages in his judgment which show that, but perhaps it would be useful if I read the part of his judgment where he said :

LORD JUSTICE ROMER pointed out that Rule 2 of the Rules applicable to Case V did not in terms say that the actual sums received in the United Kingdom must be received by the taxpayer or indeed specify by whom. He further pointed out that Rule 1 of the Miscellaneous Rules applicable to Schedule D must be read with Rule 2 of the Rules applicable to Case V, and that in Rule 1 is to be found a definition of the persons on whom tax under Schedule D is to be charged ; they are defined as being the " persons receiving or entitled to the income " in respect of which the tax is directed to be charged. It follows, as he pointed out, that if the sums in question were received in the United Kingdom as the income of Mrs. Timpson she was chargeable to tax as being the person entitled to it when it came into the United Kingdom, though in fact she never received it herself. I respectfully agree with this way of looking at the question.

That was the basis of his judgment, but it is true that at the end of his judgment he said :

> I reserve for further consideration, in case the question should ever arise, the question whether if income accrues abroad either *qua* legal estate or *qua* equitable estate to a taxpayer resident in this country, Rule 2 of the Rules applicable to Case V, and Rule 1 of the Miscellaneous Rules would make the taxpayer liable to charge in that event, even though the taxpayer disposed of his interest in that income before it was received in the United Kingdom, so long as the actual sums of that income were in fact received by the alience in this country.

I am told by the Attorney-General that the reservation was in all probability made because of the argument which was put forward by the Crown in that case, which is similar to the argument which was put forward before me, and the way the argument was framed by the Attorney-General was this : he said that notwithstanding that the gift may be complete and irrevocable outside the United Kingdom, if the subject matter of the gift comes to the United Kingdom by a direction of the taxpayer, then it is received within the meaning of Rule 2. He said in another part of his argument that where the machinery set in motion by that taxpayer results in payment to a person here in the sense that that person here gets a cheque or a draft to be cashed here that is a sum of money which is received within the meaning of Rule 2. He said that as a matter of pure construction, as I understood him, the word " received " in Rule 2 must be read as meaning " received by the direction of the taxpayer." Mr. Tucker's argument in answer to that was that there was no foundation in Rule 2 or Miscellaneous Rule 1, nor in any other part of the Income Tax Acts for extending the rule which has been laid down in *Timpson's* case (5), and that it was

clear from the decision in *Timpson's* case (5) that if the gift was complete outside the United Kingdom the taxpayer neither received nor was entitled to, and therefore was not chargeable to income tax in respect of that gift although the donee should subsequently bring it to England. He also contended that even if he were wrong upon that the money given to the daughter in this case was not her income, and that it therefore could not possibly be subject to tax if it were not income in the hands of the person who was entitled to it, and that it would be altogether foreign to the scheme of the Income Tax Acts to tax the mother in respect of a sum which belonged to her daughter and in respect of which her daughter was not taxable. The Attorney-General did not deal with this argument in his reply. Mr. Tucker also relied upon the fact distinguishing it from the facts in *Timpson's* case (5) that here it was impossible for the mother, the taxpayer, or her agent to stop the gift after it had been posted because it was not a cheque drawn by the mother or her agent, but was a draft by the American Trust upon Barclays Bank bought by the mother's agent, and therefore once it had been bought and had been posted nothing could prevent the gift being completed or could prevent it coming into the hands of the donee, whereas in *Timpson's* case (5) the mother could at any time before the actual receipt and encashment of the bill of exchange in question have stopped it. I think this is a material distinction, and I am of opinion that the contention of the Attorney-General is not well founded.

I ought also to say that Mr. Tucker based his argument in the first place upon Schedule D itself, where it provides that :

> 1. Tax under this Schedule shall be charged in respect of—(*a*) the annual profits or gains arising or accruing :—(i) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere

and he pointed out there that the profits or gains arising there are profits or gains arising to the taxpayer. Therefore he said that the provisions of Rule 2 must be read in the same way and the words " Tax in respect of income arising from possessions out of the United Kingdom " must clearly mean arising to the taxpayer, and that the words " shall be computed on the full amount of the actual sums annually received in the United Kingdom " would *prima facie* mean received by the taxpayer, and are only extended, as I understood him, by the provisions of Miscellaneous Rule 1 to sums which are received by the taxpayer or to which the taxpayer is entitled, and that, in my judgment, is the true construction of these Rules. The Attorney-General relied upon the fact that Rule 2 was only a computation rule, and he said that Miscellaneous Rule 1 was perfectly intelligible even if read as applying to income to which the person was entitled from a foreign possession, although

it was never received in this country. I am inclined to think that that is an unsound construction of Miscellaneous Rule 1 and that the words "entitled to the income" there mean entitled to the income so far as it is referring to the income from foreign possessions, and entitled to it at the time it is received in this country. I so construe those two rules when read together that they only apply to income from foreign possessions which is either received by the taxpayer in this country or to which he is entitled at the time it comes to this country. I therefore affirm the decision of the commissioners in this case.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Brown, Turner, Compton Carr & Co.* (for the respondent)

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

WITH *v.* O'FLANAGAN.

[COURT OF APPEAL (Lord Wright, M.R., Romer, L.J., and Clauson, J.), **March 12, 13 and 16, 1936.**]

Misrepresentation—Continuing representation—True when made but subsequently become untrue—Rescission.

The defendant desiring to sell his medical practice got into touch with the plaintiff in Jan., 1934, and stated that his practice had brought in £2,000 per annum for the three previous years and that he had a panel of 1,480 persons. This statement was true when made. Negotiations lasted until May 1, when the contract of sale was signed. During this period the defendant was ill and was forced to absent himself from time to time from the practice, with the result that the takings of the practice dwindled to practically nothing and the number of panel patients was reduced to 1,260. These facts were not disclosed to the purchaser, and upon discovering them immediately after completion he brought this action for rescission of the contract:—

HELD: the statements made, though true at the time, had become untrue during the negotiations and there was an obligation to disclose this fact to the purchaser. No disclosure having been made the plaintiff was entitled to rescind.

Such an obligation to disclose arises in the case of all contracts and not only in the case of those *uberrimæ fidei* or where the representation is in respect of an intention.

[**EDITORIAL NOTE.** In dealing with a contract of sale of property it is probably more convenient to speak of the necessity for disclosure than of a continuing representation. In strictness the theory of the law upon the point here in question is said to be that the material time at which the truth of a representation must be established is the time when it is acted upon and not the time when it is made. It often happens that there is no appreciable interval between the two dates; but if there is, and the representation relates to an existing state of things and not to a past event, the person making the representation is deemed to be repeating it at every successive moment during the interval unless he withdraws or modifies it in the meantime. The critical moment, however, at which it must be true if there is not to be misrepresentation, is the moment when it is acted upon by the person

to whom it is made. In other words, if its falsity at the time it is acted upon be proved, it is immaterial that it was true when made; and from a practical point of view the result is better stated thus: if the person making a representation which is not immediately acted upon finds that the facts are changing, he must before the representation is acted upon, disclose that change to the person to whom he made such representation.

As to Continuing Representation, see HALSBURY, 1st Edn., Vol. 20, Misrepresentation, pp. 678, 679, para. 1652; and for Cases, see DIGEST, Vol. 35, pp. 31, 32, Nos. 226-234.]

Cases referred to:

(1) *Davies* v. *London & Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469; 35 Digest, 31, *228.*
(2) *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413; 9 Digest 141, *784.*
(3) *Traill* v. *Baring* (1864), 4 De G. J. & Sm. 318; 35 Digest 32, *234.*
(4) *Smith* v. *Kay* (1859), 7 H. L. Cas. 750; 35 Digest 19, *109.*
(5) *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925; 35 Digest 9, *24.*

Appeal from a decision of Bennett, J., given on Oct. 29, 1935, in favour of the defendant in an action for rescission of a contract of purchase of a medical practice on the ground of misrepresentation.

The facts and arguments are set out in the judgments.

A. F. Topham, K.C., and *H. S. G. Buckmaster* for the appellants: Where a person makes a representation true at the time, but circumstances afterwards change to the knowledge of the person making the representation but not to the knowledge of the representee, it is the duty of the former to tell the representee (*Traill* v. *Baring* (3); *Re Scottish Petroleum Co.* (2)). The learned judge concluded that this proposition is confined to statements of intention or to cases of *uberrimæ fidei*; I submit it applies universally. *Brownlie* v. *Campbell* (5), *Davies* v. *London & Provincial Marine Insurance Co.* (1), *Smith & Kay* (4).

J. W. Morris, K.C., and *H. C. Dickens* for the respondents: It is conceded that if I make innocently a false representation and then discover it to be false, I must inform my vis-à-vis: but here the maxim of *caveat emptor* applies.

Lord Wright, M.R.: This is a case in which Bennett, J., has come to the conclusion that the claim of the plaintiffs ought to fail and he has made an order which, if I may say so, with great respect, goes somewhat beyond the issues before him in the action and might conceivably do some injustice, but I need not go into that aspect of the case because I have come to the conclusion, after hearing a very strenuous and long argument from Mr. Dickens, that the appeal ought to be allowed and that the matter ought to be decided on the simple question that the plaintiffs have made out their case, that they are justified in claiming rescission of the contract on the ground that it was entered into on the faith of what in the result amounted to a material misrepresentation. I state the matter in that way because the position

is this. A representation was made as to the essential nature and quality of the practice which was perfectly true at the time when it was made. There is no doubt at all as to what was actually said by way of representation. A representation was made. I take the statement from the evidence of one of the plaintiffs which evidence was not cross-examined to and not contradicted. The evidence is "that he"—that is the agent who was carrying out the transaction on behalf of the late defendant—"told me this practice was for sale and it was doing at the rate of £2,000 a year and he was asking £4,000 for it, that is to say, two years' purchase." A little below he says, having heard this from the agent, he went to Dr. O'Flanagan himself—he was the doctor who had the practice at that time—"What did Dr. O'Flanagan say about it?—(A.) He confirmed what we had been told at the agency. (Q.) When you say he confirmed it, did you tell him what the agency had said?—(A.) We said: 'We understand this practice is doing £2,000 a year, you want £4,000, and your panel is 1,480'." That was repeating what the agent had said about the panel which I did not read when I was referring to the agent's evidence, but it is repeated here, "and your panel is 1,480." He agreed with that. Evidence, so far as I can see substantially identical, was given by the other plaintiffs. The defendant called a gentleman, Dr. Chesser, who represented this agency and whose statements are referred to. He said exactly the same and it was not cross-examined to. Dr. Chesser was asked:

> What did you tell them about Dr. O'Flanagan on the Thursday? (A) We merely told them the details we had received from Dr. O'Flanagan, that the practice was doing approximately £1,500.

He corrects that to £2,000, and then he said the panel was 1,480. This is a case in which there is no doubt at all as to the actual words used and therefore the only question is, first, what do these words mean, and, secondly, what effect is to be given to them in the main factor of the case, and what consequence flows from the words. As to the meaning, I have no doubt at all that they mean exactly what they say. An intending purchaser of a practice or business is always interested to see—it is a matter of vital importance to him—what the practice or business is doing by way of income, and he may of course, as was done by the plaintiffs in this case, make some enquiries as to the past history of the practice. In this case certain accountants made a report partly on the books which seem to have been inadequate, partly on statements which they obtained from Dr. O'Flanagan, and they gave figures with regard to the income and the number of panel patients which would show they advised the practice had been doing something in the nature of what it was stated by Dr. O'Flanagan or his agent to be doing at the time the statement was made. That is the past. But what is essential to a

purchaser is to know what the practice is doing at the time, and it is that which he was relying upon to some extent and in part on the report as to the past history of the practice. But he is entitled to rely, and he does rely, on what he is told as to the present position and what the figures in the statement made by the accountants and confirmed by Dr. O'Flanagan meant, and whether or not the plaintiffs relied on the report of the advisers as to the past is comparatively of minor importance if they relied, as no doubt from the evidence they did rely, on the statement made at the time as to the present position of the practice. That was a most essential statement as to the nature and quality of the practice which was put up for purchase. As I say, that appears to have been true at the time it was made, but the purchase was not actually completed until May 1 of the same year. When exactly the statement was made it is not precisely defined in the evidence, but beyond question it was made some time about the end of Jan., 1934. In the interval between these two dates, however, Dr. O'Flanagan unfortunately became ill, I am not sure at what date he became acutely ill, but he went away for a holiday and was absent from a date in Feb. to Mar. 4., and after then a Dr. Tibbles acted as locum-tenens for a week, then another locum-tenens came in, so Dr. O'Flanagan was absent for about 16 days. He came back and attended again to the practice on Mar. 4, and went on on his own until Apr. 4, and then another doctor, a Dr. Armstrong, had charge of the practice. On Apr. 4 Dr. O'Flanagan came back and he carried on the practice at the premises in Gower Street. The practice was conducted not only at Gower Street but at an address in Coram Street, and during this period from Apr. 4 to 10, Dr. Moreham continued in charge of the practice at Coram Street. That brings one to Apr. 10. On Apr. 10 the defendant, whose health was getting worse, absented himself from the practice altogether. So matters went on until May 1, when the plaintiffs entered into possession on the execution of the contract. During the period from Apr. 10 to May 1, a Dr. Stern acted as locum-tenens. He was called and the evidence he gave was that during the three weeks he was there the practice was not doing more than on an average £5 a week, and he says out of that total average, £10 came from the payments from a single patient. On May 1 the agreement was executed. I need not refer to its terms but when the plaintiffs took possession on the evening of May 1 they found that there was no practice going on at all; they stayed, two or three days, nobody seemed to come, and no doubt they made enquiries and they considered the matter. Eventually they wrote a letter in which they said they were not bound by the contract and claimed rescission. That letter is dated May 3, 1934. They say:

> Instead of the average takings being on the basis of £2,000 a year as represented by your client, it appears that the last three weeks have averaged about £5 a week,

and instead of the number of panel patients being 1,480 as represented by the vendor, the number is now under 1,250.

The reply to that on May 4 is a little significant :

> Our client states emphatically that he only represented the takings to be £2,000 a year for the period of a little over two years ending at the end of last year, d_ing which he was in control of the practice. No representations were made about the present state of the practice.

That is important as showing that Dr. O'Flanagan, who unfortunately was ill, was not so ill that he could not have been consulted by his advisers. I find exactly the same indication in a letter of Apr. 16, 1934, in reply to a letter of Apr. 12, 1934, from the plaintiffs' advisers. I will indicate very shortly the circumstances under which this letter was written. The plaintiffs had about that time become aware that Dr. O'Flanagan had been absent, or was absent, and that the practice was in the hands of a locum ; they were naturally very anxious and they pointed out that what they were buying, therefore, was a practice with an introduction, whereas in fact if the practice was placed in the hands of a locum-tenens all they were getting was a succession. That being so they claimed that the purchase price which had been fixed provisionally at £4,000 should be reduced to some extent. In this letter they suggest that £3,000 would be enough. I will not discuss that in detail, but they end the letter by saying this :

> We understand that a locum is looking after Dr. O'Flanagan's practice at the moment, and this, of course, is a matter of some concern to our clients. If the purchase is going through they feel very strongly that it should be completed at the earliest possible moment, possession being given of both consultation rooms as early as possible. It, however, will not be practicable to complete the purchase of the house before June 1.

That was because one of the terms of the purchase was that the plaintiffs were to take over the house and leasehold interest in the premises at Gower Street and Coram Street respectively, and they were to pay a substantial sum for the transfer of the leasehold interest in Coram Street. The answer to that is on Apr. 16, 1934, from the defendant's solicitors :

> We beg to advise you that we saw Dr. O'Flanagan on Saturday evening last on your letter of the 12th inst. He is not prepared to accept the offer therein contained—

—that is, to reduce the purchase price in the way I have indicated—

> as he feels that he will be able to commence an introduction on June 1. We are also advised that the present locum is quite efficient and is looking after the practice satisfactorily.

It may be that but for that letter, which is not relied upon as a separate cause of action, the plaintiffs would have been put upon enquiry or

rather, having been put on enquiry they would have resumed, and probably they ought to have resumed, their research further into the matter. Dr. With says that he never knew until afterwards that there had been more than one locum-tenens in charge of the practice, but the letter was well calculated to still any doubts or suspicions and to distract the plaintiffs' mind from the necessity of making any further enquiries. Having received that letter they went on with the transfer and completed on May 1, and they then were disillusioned in the way I have stated. At some time, either Apr. 12 or 19, or possibly at some intermediate date, because it is not very clear, there was an alteration, it was orally agreed, of the purchase price, and it was reduced to £3,750, which is the sum that appears in the agreement.

These being the facts, in my opinion, the plaintiffs have established the representations of fact which I have already stated and they have established that a material alteration in the position had taken place between the date of that representation and the date at which the contract was completed, and they have also established that no communication was made by Dr. O'Flanagan or anybody on his behalf of that change of circumstances. But that all the facts were known to either Dr. O'Flanagan or his agent I have no doubt at all. These two letters are letters of a person consulted, a person capable of giving advice, some responsible person on Dr. O'Flanagan's behalf who knew exactly what was happening. That being so, on any view of the position, I think that the change in circumstances ought to have been communicated to the plaintiffs before they were allowed to close the transaction. Instead of that, they were drawn out of the fact and induced not to pursue their doubts any further. That is not in a sense essential; the essential and material fact remained unqualified and uncontradicted and in truth it was acted upon eventually when the bargain was concluded on May 1. The learned judge finds as to the change in the position:

> It has been proved by the plaintiffs that during that period (some three weeks) when Dr. Stern was looking after the practice, the takings amounted to about £5 a week, and that does not seem to me to be at the rate of £2,000 a year.

I agree with that view of the position. A representation is not like a warranty; it is not necessary it should be strictly construed or strictly complied with; it is enough if it is substantially true; it is enough if it is substantially complied with. If it is not substantially complied with then the court finds itself in the range of misrepresentation and must give effect to that position if it is satisfied that the plaintiffs acted upon the representation in concluding a bargain about which there can be no doubt in this case.

As to the law, which has been challenged, I want to say this. I take

the law to be as it was stated by FRY, J., where it is expressed most fully, perhaps, in the case of *Davies* v. *London & Provincial Marine Insurance Co.* (1). That was a case where certain friends of an agent had agreed to deposit a certain sum of money for what was alleged to have been certain defaults on his part. The company who had employed him were in the belief and were advised that the default of the agent constituted felony, but they were also later advised that these acts did not amount to felony and they withdrew the order for his arrest, and then, still later in the day, the friends of the agent agreed to deposit a sum of money on the footing of what they had been told earlier in the day before the arrest had been withdrawn—these statements had not been corrected and on that footing it was held by FRY, J.,

> that the change of circumstances ought to have been stated to the intending sureties, and that the agreement must be rescinded and the money returned to the sureties.

I need not read the whole of the passage in the judgment which occurs at page 474, but I need only refer to one or two points. The learned judge points out :

> Where parties are contracting with one another, each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those who say that there was a duty to disclose, to shew that the duty existed.

Then the learned judge points out in many cases there is such a duty as between persons in a confidential or a fiduciary relationship where the pre-existing relationship involves the duty of entire disclosure. Then his Lordship says :

> In the next place, there are certain contracts which have been called contracts *uberrimæ fidei* where, from their nature, the court requires disclosure from one of the contracting parties.

The learned judge refers to contracts of partnership and marine insurance. Then he goes on, on page 475 :

> Again, in ordinary contracts the duty may arise from circumstances which occur during the negotiation. Thus, for instance, if one of the negotiating parties has made a statement which is false in fact, but which he believes to be true and which is material to the contract, and during the course of the negotiation he discovers the falsity of that statement, he is under an obligation to correct his erroneous statement ; although if he had said nothing he very likely might have been entitled to hold his tongue throughout.

Then he adds what was material in that case and what is material in this case :

> So, again, if a statement has been made which is true at the time, but which during the course of the negotiations becomes untrue, then the person who knows

that it has become untrue is under an obligation to disclose to the other the change of circumstances.

Very much the same was said by the same learned judge, then a Lord Justice, in the case of *Re Scottish Petroleum Company* (2). The facts there were very simple. A man took shares in a company on the faith of a statement that the company had four directors and one of whom was personally known to him and in whom he had confidence. That was a representation of the existing fact, perfectly true at the time. He applied for shares on the faith of that representation, but before that application was made the particular director and one other had ceased to be directors and he claimed to be entitled to withdraw his application and he claimed an order rescinding the allotment of shares which had been made to him on his application. Fry, L.J., held that *prima facie* the applicant had a right to repudiate his bargain by reason of the change of circumstances. A complication arose because the allotment had been made and the applicant instead of claiming at once to be relieved and to have his name taken from the list of members of the company, stood by for some time and then applied at a later stage. His claim failed because of that delay. Fry, L.J., said in terms, apart from that delay he would have had the right to be relieved. The learned Lord Justice refers and quotes at length a very important passage from a judgment of Turner, L.J., in *Traill* v. *Baring* (3), at page 329, in confirmation of his view. Perhaps I ought to read that passage. This is what his Lordship said :

> I take it to be quite clear, that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances ; and that this court will not hold the party to whom the representation has been made bound unless such a communication has been made

Then the learned Lord Justice goes on to give an illustration :

> Thus, suppose a man agrees to execute a deed releasing his debtor upon certain terms on the assurance that another person, also a creditor of the debtor, has agreed to do the same, and the other creditor has in fact agreed to do so at the time but has afterwards withdrawn from the agreement, and the withdrawal is not communicated to the person who has agreed to give the release upon the faith of another creditor having agreed to do the same, although it is known to the person upon the faith of whose assurance he agreed to give the release ; and he executes the deed. This court would not hold him bound by the deed he had executed.

In these cases—I need not refer to others on this point—the position is based upon the duty to communicate the change of circumstances.

The matter, however, may be put in another way though with the same effect, and that is the ground may be that the statement made under such circumstances, that is to say, a representation made as a matter of inducement to enter into a contract, is to be treated as a continuing representation. That view of the position—not quite the same case, and I need not discuss the facts—was put in *Smith* v. *Kay* (4) by LORD CRANWORTH at page 769. He said a representation of a contract, a representation made some time before the date of the contract, though in negotiation,

> It is a continuing representation. The representation does not end for ever when the representation is once made; it continues on. The pleader who drew the bill, or the young man himself, in stating his case, would say, "Before I executed the bond I had been led to believe, and I therefore continued to believe, that it was executed pursuant to the arrangement."

The underlying principle is also stated again in a slightly different application by Lord Blackburn in *Brownlie* v. *Campbell* (5), at page 950. I need only quote a very short passage. LORD BLACKBURN says:

> when a statement or representation has been made in the *bona fide* belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on, and still more, inducing him to go on, upon a statement which was honestly made at the time when it was made, but which he has not now retracted when he has become aware that it can be no longer honestly persevered in.

The learned Lord goes on to say that would be fraud, though nowadays the court is more reluctant to use the word "fraud" and would not generally use the word "fraud" in that connection because the failure to disclose, though wrong and a breach of duty and having consequences, may be due to inadvertence or a failure to realise that the duty rests upon the party who has made the representation not to leave the other party under an error when the representation has become falsified by a change of circumstances. This question only occurs when there is an interval of time between the time when the representation is made and when it is acted upon by the party to whom it was made who either concludes the contract or does some similar decisive act, but the representation remains in effect and it is because that is so, and because the court is satisfied in a proper case on the facts that it remained operative in the mind of the representee that the court holds that under such circumstances the representee should not be bound.

I have discussed the law at some little length because the cases which I have referred to show, I think, that this doctrine is not limited to cases of contracts *uberrimæ fidei* or to any cases in which owing to confidential relationship there is a peculiar duty of disclosure; on the contrary, the

passage which I read of Fry, J., shows quite clearly that he distinguishes this consequence as one which arises in cases in which if the party was silent, there would be no duty to disclose at all. I mention that because Bennett, J., referring to *Traill* v. *Baring* (3), says this :

> *Traill* v. *Baring*, I think, is a case which either falls into a class of case in which the contract was one in which the law requires the utmost good faith (it was a case in which the contract sought to be set aside was one of insurance) or it is a case which is in principle limited to a case in which there has been a representation with respect to intention and the parties to the contract relied upon the intention which one of them represented himself to have continued in up to the time when the contract was made.

With the greatest respect to the learned judge, I cannot find in the authorities, so far as I know them or so far as they have been brought to my attention, any justification for these limitations. It is true *Traill* v. *Baring* (3) was a case of contract of insurance, but the illustration which Turner, L.J., proceeds to give is not a contract of insurance but an ordinary contract, and the other cases I have referred to, quite apart from the statements of the principle, are cases in which the contracts are not *uberrimæ fidei*.

On these grounds, with great respect to the learned judge, I think he ought to have come to the conclusion that the plaintiffs have established their case and there ought to be a declaration rescinding the contract and the consequences which follow upon such a declaration.

Romer, L.J. : I agree. The only principle invoked by the appellant in this case is as follows. If A. with a view to inducing B. to enter into a contract makes a representation as to a material fact, then if at a later date and before the contract is actually entered into, owing to a change of circumstances, the representation then made would to the knowledge of A. be untrue and B. susbequently enters into the contract in ignorance of that change of circumstances and relying upon that representation, A. cannot hold B. to the bargain. There is ample authority for that statement and, indeed, I doubt myself whether any authority is necessary, it being, it seems to me, so obviously consistent with the plainest principles of equity.

The only question we have to decide in the present case is, as it seems to me, what was the representation made on Jan. 21 ; secondly, had that representation, owing to the change of circumstances to which the Master of the Rolls has referred, become untrue by May 1 when the contract was entered into ? The representation was this. It was made originally by the agent to Dr. O'Flanagan and subsequently confirmed by Dr. O'Flanagan himself that the practice was doing at the rate of £2,000 a year and he, that is Dr. O'Flanagan, was asking £4,000 for it, that is to say, two years' purchase. The reference to two years' purchase makes it plain to me that the statement that the practice was doing

at the rate of £2,000 a year was intended to be a statement as to an essential feature of the practice, that is to say, a representation to the proposing purchaser that if they bought the practice they would be buying what might properly be called a £2,000 a year practice. Had that statement become untrue by May 1 ? It appears to me plainly it had. It is stated by Dr. Stern, who was the locum-tenens during the last of the three periods that Dr. O'Flanagan was unwell, that he only took on an average £5 a week during three weeks and, as the Master of the Rolls pointed out, of that £15, £10 was received from one patient. It is plain from the evidence of the two plaintiffs who were called, who intended purchasing the practice and entered into the practice on May 1, the practice was a dead one. Under those circumstances, with the greatest respect to BENNETT, J., it appears to me that the plaintiffs are entitled to succeed in the action and this appeal should be allowed.

CLAUSON, J. : I agree.

Solicitors : *Merton Jones, Lewsey & Jefferies* (for the appellants) ; *David Morris & Co.* (for the respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

IZZARD *v.* UNIVERSAL INSURANCE CO.

[King's Bench Division (MacKinnon, J.), **March 30, 1936.**]

Insurance—Third party risks—Passenger carried by reason of or in pursuance of a contract of employment—Road Traffic Act, 1930 (*c.* 43), *s.* 36 (1) (*b*) (ii).

An insurance company were the insurers of one, D., in respect of a motor lorry used in D.'s haulage business. In connection with a haulage contract, D. agreed to carry certain men in his customer's employ. In respect of the death of one of them a judgment for £850 was recovered against D. and, upon D.'s bankruptcy, the widow of the deceased claimed to recover against the insurers. The policy contained a proviso that the insurers should not be liable in respect of the death of or bodily injury to any person carried, other than by reason of or in pursuance of a contract of employment :—

Held : the words inserted in the policy were taken from the Road Traffic Act, 1930, s. 36, and must be construed in the same way as the words of the section. It was impossible to add the words " with the insured " to the words in the section to make it read " by reason of or in pursuance of a contract of employment with the insured," and the insurers were liable under the policy although the deceased was not under any contract of employment with the insured.

[**EDITORIAL NOTE.** The matter for decision here is the construction of a clause in a policy of insurance against third party risks ; but as the clause is copied from the Road Traffic Act, 1930, s. 36, the construction of the clause is founded upon the construction of the section, and for this purpose the learned judge proceeds to consider the construction of part of that section, a matter which has not before received judicial consideration. It is necessary to notice that in proviso (i) the words are " a person in the employment of a person insured," whereas in proviso (ii) the words are " by reason of a contract of employment." In the second proviso it will be noted that the words " of the insured " are omitted, and the case decides that they must have been purposely omitted.

For the Road Traffic Act, 1930, s. 36, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 637, and HALSBURY, Hailsham Edn., Vol. 18, p. 561, para. 909.]

Arbitrator's award stated in the form of a special case for the decision of the court. The respondents were insurers of a man named William Druce in respect of a motor vehicle which was used in his business of a haulage contractor, sand and gravel merchant, coal merchant, and farmer. Druce was engaged by Industrial Builders, Ltd., to go to Coventry, and there was an arrangement made between Druce and Industrial Builders, Ltd., that Druce should carry on his lorry workmen in the employ of Industrial Builders, Ltd. On July 21, 1934, while travelling from Coventry to Didcot, there was an accident to the lorry and three of the workmen were killed. The widow of one of these men named Izzard took action against Druce and was awarded £850. Druce became bankrupt, and Mrs. Izzard now claimed, as a third party under the Third Parties (Rights Against Insurers) Act, 1930, against his insurers.

The proviso to the Road Traffic Act, 1930, s. 36, Sub-s. 1 referred to herein, is as follows :

Provided that such a policy shall not be required to cover :—
(i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such person arising out of and in the course of his employment ; or
(ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise.

Tristram Beresford, K.C., for the respondents : The insurers are not liable, as Izzard was not being carried under a contract of employment, and there was a proviso in the policy by which they were exempted from liability. To hold the insurance company liable in such a case as this would be holding the company liable in respect of a number of persons of whom they had no knowledge at all. It could not be that the words in the Road Traffic Act, 1930, s. 36, meant any person who had a contract of employment was covered, because every person who was given a lift by a driver might say that he had a contract of employment with somebody and thus place himself upon the driver's policy or the policy of the driver's employer.

H. D. Samuels, K.C., and *Frank Soskice*, for the claimant : The facts have been found by the arbitrator. It is necessary to look at the words of the policy and if they are ambiguous, they must be construed against the company. It is said that the proper meaning to be given to the words in the policy meant a contract of employment between the deceased and the insured. That view is too narrow and is wrong. The learned arbitrator has found that the motor vehicle was being used for one of the purposes mentioned in the schedule, and therefore there was no breach of warranty. There was a finding of fact that Izzard was being carried within the meaning of a contract of employment. There was nothing in the policy to indicate that it must be a contract between the policy-holder and his servants. The award is right and should stand.

MacKinnon, J. : On July 21, 1934, one George Izzard was riding as a passenger in a lorry belonging to a man named William Druce, between Didcot and Coventry, or *vice versa*. Unhappily, the lorry upset and the unfortunate man Izzard was killed. Thereafter, the widow, Mrs. Izzard, brought an action under Lord Campbell's Act against William Druce, and in Jan., 1935, at the Assizes in Reading, she recovered £850 and costs. In Feb., 1935, Druce became bankrupt. Mrs. Izzard then sought to take advantage of the Third Parties (Rights Against Insurers) Act, 1930, and made her claim against the respondents in this case, the Universal Insurance Company, Limited, to recover the £850 and costs which she had been awarded against Druce. The policy

issued by the Universal Insurance Co. is headed "Commercial Motor Vehicle Policy," and in its operative part as to benefits in sect. 2, says:

> **Liability to third parties.** The company will indemnify the insured against liability at law for compensation and claimant's costs and expenses in respect of the death of any person caused by or arising out of the use of any vehicle described in the schedule.

It is quite clear that Mrs. Izzard would have a right to be indemnified against the liability of Druce, had Druce any liability for the death of Izzard. But the company claim, and point out, that the statement that "the company will indemnify the insured" is subject to a proviso "provided that the company shall not be liable in respect of" certain things, including "(*c*) the death of or bodily injury to any person carried, other than by reason of or in pursuance of a contract of employment" in or upon such vehicle. The company say: "We have agreed to indemnify the insured against that liability, but it is excluded by the proviso because that was the death of a person being carried in or upon this vehicle and was not a passenger carried by reason of or in pursuance of a contract of employment," and the whole question in this case is: can Mrs. Izzard say in answer to that contention of the company: "The proviso does not exempt you from liability. My husband was a passenger carried by reason of or in pursuance of a contract of employment"? There are certain circumstances in which Mr. Izzard was being carried in Mr. Druce's lorry, and they are found to be stated in paras. 8 and 9 of the special case. They are as follows:

> 8. By a verbal contract made in or about the month of April, 1934, between the Industrial Builders, Limited, and William Druce, the said William Druce agreed to do haulage work for and to put a lorry at the disposal of Industrial Builders, Limited, the terms of payment being 35*s*. for the journey between Didcot and Coventry whether men were carried on the lorry or not.
>
> 9. By a verbal contract of employment made in April, 1934, the said Izzard agreed to work at Coventry for the said Industrial Builders, Ltd., on terms that he should get increased rates of pay and that a lorry should be at his disposal to carry him.

The learned arbitrator has found in these circumstances that in fact Izzard was being carried in this vehicle by reason of a contract of employment or in pursuance of a contract of employment with Industrial Builders, Ltd., and the whole point of law which arises in this case depends upon the true construction of the few words in the policy: "other than a passenger carried by reason of or in pursuance of a contract of employment." If that means a contract of employment with any other contracting party, then Izzard was being carried in this vehicle by reason of a contract of employment, that is, with Industrial Builders, Limited. But if the true meaning of these words is "by reason of or in pursuance of a contract of employment with the insured," then as

there was no contract of employment between Izzard and Druce, Izzard was not being carried as a passenger by reason of or in pursuance of a contract with the insured. I have not yet mentioned the section, but it is quite obvious that the provisoes in the policy are copied from the Road Traffic Act, 1930, s. 36, and the real question is: what is the meaning of "a contract of employment" as used in sect. 36 (1) (*b*) (ii), or as stated and copied almost verbatim in sect. (*c*) of the proviso to sect. 2 of the policy? At first sight, it seems, I think, obvious, when these words are in the Act and in the policy, that they are dealing with contracts made by the insured person. The whole of the provisions are dealing with the situation and the liability to the insured person, but there is, I think, one thing outstanding: the contrast between the two sections and provisoes in the Act of Parliament and the corresponding two sects. (*b*) and (*c*) of the provisoes as copied out in the policy. Sect. (*c*) is: "to any person carried other than a passenger carried by reason of or in pursuance of a contract of employment"; but it does not say in connection with a contract of employment with the insured. If it had been mentioned it would mean that it would be almost inevitable that Parliament would have repeated in the para. (ii) of the proviso to sect. 36 the words "contract of employment with the insured," as in the earlier part. Furthermore, if the second part of the proviso "carried by reason of or in pursuance of a contract of employment" means with the insured, it is difficult to see why that would not be merely repeating the words in the earlier part of the proviso because it must have been within the contract with the insured to be covered by the term "contract of employment with the insured." The first part of the proviso has something to do with Workmen's Compensation Insurance, and the words may have been inserted in contemplation of that. But none the less, it seems to me that a person who is being carried in pursuance of a contract of employment would be within these terms, and the only conceivable reason is that the words in the earlier part are to cover the case of an employee earning more than the maximum wage or salary as he would be able to claim under the policy. If the proviso had referred in terms to the Workmen's Compensation Act, there would have been a great deal in that. It may be difficult to see what was the intention of the legislature in making it incumbent upon people to insure their liability to passengers carried by reason of or under a contract of employment. This particular passage is a case which may well fall into what was contemplated or it may have had some other purpose in view. But I am only concerned with the construction to be put upon those words. I see no reason for adding after the words "contract of employment" used in the Act of Parliament and in the proviso in the policy the three words "with the insured." I think that Izzard, as has been found as a fact by the learned arbitrator, was being carried in

pursuance of a contract of employment. That being so, I think his death was within the construction of the proviso, namely, that he was a passenger carried by reason of or in pursuance of a contract of employment, and therefore the company has to indemnify Druce in respect of the death of Izzard which arose out of the accident. The policy is described as a commercial motor vehicle policy, and the proposal form is to be the basis of the contract. In that proposal, in answer to a question, "Are passenger risks to be covered?" the insured answered "No"; and the basis of this policy is that passenger risks shall not be covered and that the company should not be liable for damages in respect of passengers. But Druce and the company were both subject to sect. 36 of the Act of 1930, and although Druce may have undertaken that his vehicle would not be used for carrying passengers, it is quite clear that the company is, notwithstanding that warranty, liable to indemnify him against the death of or injury to a person who is being carried in pursuance of a contract of employment. The whole policy must be read together and the passage in the latter part must be read as meaning, notwithstanding anything that had been warranted, yet as the Act requires you, so we will insure against the death of a passenger who is carried in pursuance of a contract of employment. As I say, it is a common point, and it all turns upon the meaning of these few words, "by reason of a contract of employment" I think that the true construction is that the learned arbitrator was right and therefore the award in this case should be upheld and the insurance company should pay the costs of this argument.

Solicitors: *L. Bingham & Co.* (for the claimant); *A. D. Vandamm & Co.* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

BURGOYNE *v.* ROSE BRIDGE COLLIERY CO., LTD.

[COURT OF APPEAL (Slesser, Greene and Scott, L.JJ.), **April 1, 2, 1936.**]

Master and servant—Workmen's compensation—Reference to medical referee by consent—Report remitted by registrar without consulting parties—Jurisdiction of registrar—Workmen's Compensation Act, 1925 (c. 84), *s.* 19 (2)—*Workmen's Compensation Rules*, 1926, *r.* 57.

A workman was struck in the eye by a flying piece of metal and totally incapacitated. After he had received compensation for six months his employers served on him a notice of termination of payment, containing a medical certificate stating that he had recovered. The workman served a counter-certificate, and the parties agreed on a reference to a medical referee. The registrar sent to the medical referee a request for an answer to the questions : whether the workman had recovered, whether he was fit to resume his original employment, and, if not, what kind of work he could do and whether the incapacity was due to the accident or other causes. The medical referee returned an answer which did not appear to the registrar to deal fully with the questions. The registrar, without consulting the parties, returned the certificate to the medical referee and asked him to certify what work the man would be fit for if he were only suffering from the slight incapacity resulting from the accident. The medical referee thereupon added to the end of his certificate an answer that the man would in that case be fit for his ordinary work. At the ensuing arbitration the parties learned for the first time that the certificate had been amended on the registrar's request. The deputy-judge regarded the addition as equally conclusive with the rest of the certificate, and declined to award compensation. The workman appealed :—

HELD : the registrar had no jurisdiction without the consent of the parties to remit the certificate to the medical referee, and there must be a new trial, after the referee has answered certain questions formulated by the court.

[**EDITORIAL NOTE.** In the present case the registrar remitted a report back to the medical referee with a supplementary question. This was held to be beyond his powers, since at that stage, the reference to the medical referee being by consent, the registrar's duty was purely ministerial, i.e., to inform the parties that the certificate had been received and might be inspected. No further question could be submitted at that stage without the consent of the parties. The court, however formulated the question to be submitted to the medical referee for his answer.

AS TO CERTIFICATE OF MEDICAL REFEREE, see HALSBURY, 1st Edn., Vol. 21, Master and Servant, p. 183, para. 394 ; and FOR CASES, see DIGEST, Vol. 34, pp. 467, 468, Nos. 3823-3834.]

Case referred to :

(1) *Connor* v. *Cadzow Coal Co., Ltd.*, [1932] A.C.1 ; Digest Supp.

Appeal by a workman from an award made by DEPUTY-JUDGE O. G. MORRIS at Wigan County Court on Jan. 17, 1936. The facts appear from the judgment of SLESSER, L.J.

H. I. Nelson, for the workman : The registrar had no power to remit the certificate to the medical referee, and it must be read without the addition. There is no rule permitting anybody to send back a referee's certificate. The parties have agreed three questions and the referee

has answered them all in detail without this addition. The workman is entitled to an award, and this court should make an award on the evidence which was before the deputy-judge.

E. W. Cave, K.C., and *J. Fraser Harrison* for the employers: At the hearing both applicant and respondent knew what questions were agreed between them and what answers had been given by the medical referee. No objection was taken at that time. As the parties were agreed that the certificate answered the questions which were put by them, there can be no dispute as to jurisdiction. The registrar has merely pointed out to the medical referee that he has not completely answered the questions. If the certificate had been left as it was, either party or the judge could have had the certificate remitted, a procedure which would have taken time and cost money. The medical referee is always liable to error, and the registrar is entitled to help him carry out his duties. The registrar did not pose a new question, but one within the ambit of the previous questions; the answer was also inside the scope of the previous questions.

Nelson, in reply.

Slesser, L.J.: This is an appeal from a judgment of Mr. Morris, deputy-judge, sitting at Wigan. The applicant, Samuel Burgoyne, who had for a considerable time been working with the respondent employers as a dataller, claimed compensation from his employer. On Oct. 22, 1934, he was struck in the right eye by a piece of metal or coke and was totally incapacitated for a time. He was paid compensation up to Mar. 19 at the rate of 20*s.* 10*d.*, which was the appropriate rate for total incapacity. On Mar. 8 there was served upon him under sect. 12 of the Act a notice by the employers containing a medical certificate, which stated that in the opinion of the employers' doctor he had recovered. The workman served a counter-certificate which did not agree with that view, and under sect. 19 of the Act the parties agreed to send certain matters to the medical referee for determination. Sect. 19 of the Act lays down that the parties may agree to have the matter settled by a medical practitioner after examination, or, where one party disagrees, it may be that the other party by following the procedure laid down in the section will yet get an order. The matter is provided for in sect. 19 (2). [His Lordship read the subsection.]

In this case both parties agreed that certain matters should be sent to the medical referee, and an application was made by the applicant and the respondents to the registrar dated Mar. 22, 1935. That application is provided for, so far as the rules are concerned, by the Workmen's Compensation Rules, r. 57 (2):

> Form 49.—An application to the registrar to refer any matter to a medical referee shall be made in writing—

We need not deal with the case where only one party makes the application—

and shall contain a statement of the facts which render the application necessary, according to the form in the appendix, and shall be accompanied by a copy of the report of every medical practitioner who has examined the workman either on behalf of the employer, or on the selection of the workman. The application shall be signed by . . . both of the parties.

That was done, and the application on Form 49 recites that :

On Oct. 27, 1934, notice was given by [or on behalf of] the above-mentioned Samuel Burgoyne to the above-mentioned Rose Bridge Colliery Co., Ltd., of personal injury caused to the said Samuel Burgoyne by accident arising out of and in the course of his employment, in respect of which injury the said Samuel Burgoyne claims compensation from the said Rose Bridge Colliery Co., Ltd., under the said Act.

Questions have arisen between the said Samuel Burgoyne and the said Rose Bridge Colliery Co., Ltd., as to the condition and fitness for employment of the said Samuel Burgoyne or as to whether [or to what extent] the incapacity of the said Samuel Burgoyne is due to the accident, and no agreement can be come to between the said Samuel Burgoyne and the said Rose Bridge Colliery Co., Ltd., with reference to such questions.

It will be observed there that "questions have arisen as to the condition and fitness for employment" of Burgoyne and as to whether the incapacity of Burgoyne is due to the accident. That is in the statutory form. Then comes the applicant's request that an order may be made referring the matter to a medical referee for his certificate as to the condition of the said Samuel Burgoyne ; and then follow certain specific matters which were agreed upon between the parties and are added to the printed form. They are as follows :

(1) Whether or not the said Samuel Burgoyne has recovered from the effects of the accident ;

(2) Whether or not he is fit to resume his original employment as a dataller ; and

(3) If he is not so fit, specifying the kind of work he is capable of performing, and particularly whether the incapacity is due to the accident or is due to other causes.

On Apr. 11, 1935, in answer to that request, the medical referee returned to the registrar certain answers. Under Workmen's Compensation Rules, r. 57 (3) :

On the hearing of the application the registrar may on payment by the applicant or applicants of the fee . . . refer the matter to a medical referee : and shall forward to such medical referee by registered post one of the filed copies of the application and reports, with an order of reference.

There are provisions that in certain exceptional cases the registrar, or, on appeal, the judge, may refuse so to refer, and order that the matter be dealt with by arbitration in default of agreement ; but that question does not arise here. This was not a case where the registrar

or the judge felt any such difficulty, and the matter was duly sent to the referee by an order of the registrar dated Apr. 2, 1935. The answer, dated Apr. 11, which I have mentioned, sets out the condition of Burgoyne as follows :

> He appears to be in good health. Right eye : more prominent than left, and lids are wider open ; vision very defective ; cornea shows faint scarring, result of accident on Oct. 27, 1934. No other signs of injury. The back of the eye shows a large central pear-shaped pigmented area of degeneration which, from the evidence, existed before the accident. The eye is short-sighted, but on account of this latter defect, vision is not much improved by a glass. Left eye : much cataractous change not attributable to accident, likely to get worse, operation for cataract may be required later on ; vision defective, even with a powerful short-sighted glass.
>
> He is not fit to resume his original employment as a dataller, but is fit for light work on the surface.

So far it is clear that both eyes were in different ways affected and that, whereas the cornea had faint scarring as a result of the accident, there were other degenerations and weaknesses of the eye which might render him unfit to be a dataller, not caused by the accident at all. The answer goes on :

> The incapacity of the said Samuel Burgoyne is partially due (but only slightly) to the accident, and is mainly due to other causes not attributable to the accident.

Now there in its original form the certificate ended, and in that form it was duly returned to the registrar. The registrar's duties on receipt of that answer seem to me to be express ; they are set out in rule 57 (8) to the following effect :

> On the receipt of the certificate of the medical referee the registrar shall inform the parties by post that it has been received, and shall permit any party to inspect the same during office hours, and shall on the application and at the cost of either party furnish him with a copy of the certificate, or allow him to take a copy thereof.

There can be no question that on the face of it this was a certificate. It purports to have been made under the Act, it is certified, and in terms it appears to deal with the matters submitted. But the learned registrar took the view—and it is a view which, I may say, I share—that the answers to those questions as they appear in that form do not conclude the question which is raised in the arbitration : namely, whether the man is now suffering from incapacity partially due to the accident. The registrar, therefore, feeling that, took it upon himself, without consultation or communication with the parties, on Apr. 15 to send to the medical referee a request that he would certify what work the man would be fit for if he were only suffering from the slight incapacity resulting from the accident. In my opinion the registrar in doing that was acting without any jurisdiction conferred upon him by the Act, or the rules made under the Act. It is true that under rule 57 there are certain matters on which the registrar has to perform judicial or *quasi-*

judicial functions. He has, for example, to decide whether the case is one of exceptional difficulty and ought to be dealt with by arbitration under rule 57 (3). He may have other functions to perform of a judicial or *quasi*-judicial character. But with regard to the sending of the application which he has received from the parties to the medical referee, and the dealing with the certificate when he receives it back under clause 8, in my opinion his functions were purely ministerial.

It is true, as Mr. Cave says, that as what he received back was not a certificate at all, that it could not be said that he had received a certificate which would put duties upon him. But once he has received what is on the face of it a certificate, it is not for him, in my opinion, to consider whether the questions were or were not properly answered. His duties are simple: they are to inform the parties by post that it has been received and to permit any party to inspect the same. Much less has he the power, even had he the power to ask the medical referee to amplify his answers, to suggest to him, as he has done here, the kind of question which he would be required to answer. In this case, according to the judge, the registrar caused a request to be sent to the medical referee that he should certify what work the man would be fit for if he were only suffering from the slight incapacity resulting from the accident—a very pregnant question, if I may say so, and possibly a very useful question, but one which the registrar had no authority to formulate at all. I am, however, quite clear in my mind about this. I do not decide this point merely because the specific question was formulated. I do not think that the registrar had any function to perform at all to enquire into the adequacy of the answer or to endeavour to correct any inadequacy. Those are all functions of a judicial or *quasi*-judicial character. In my opinion his duty at this stage was purely ministerial: to intimate to the parties under rule 8 that the certificate had been received and that it might be inspected.

The importance of strictness on these matters is made very clear when one considers sect. 19 itself. In sect. 19 (3) it is provided that the answer of the medical referee which specifies the kind of employment for which the workman is fit, the incapacity, and the like "shall be conclusive evidence as to the matters so certified." There are cases which decide—if authority were necessary—that, when the requirements of the certificates have been properly complied with, those certificates are conclusive and binding on the court itself. It is therefore of the utmost importance that nothing should be done with regard to these certificates, which have such important evidential value, which is not expressly provided for in the Act, and that no authority like the registrar, however well-intentioned and benevolent, should arrogate to himself duties which the rules and the statute do not confer upon him.

In those circumstances, on Apr. 15 the registrar thought fit to make a

further request, without consulting with the parties and without any authority from them. Had there been authority from the parties—who, after all, had originated this reference by mutual agreement—a different question altogether might have arisen. The medical referee, as appears from the certificate, added to the end of it certain other words to the following effect :

> If the man were only suffering from the slight incapacity resulting from the accident, he would be fit for his ordinary work as a dataller.

That is duly initialled. Now the learned judge has come to the conclusion that the certificate, so extended, is conclusive and binding upon him as to the condition and fitness for employment of the workman, the kind of employment for which the workman was fit, and the extent of the incapacity which was due to the accident. In my opinion the learned judge was wrong in coming to the conclusion that the certificate, so added to, was binding upon him. A certificate under sect. 19 is conclusive evidence as to the matters certified, but only those matters can be certified which have been properly referred to him either by the parties or, in the case (not this case) where one party desires it, under the provisions of sect. 19 by order of the judge on appeal or otherwise by the registrar. So this is not, taken in its entirety, a certificate ; it is a certificate and something added thereto which has no authority to be there. As the judge has held himself bound by the whole certificate with the noxious matter added, it follows (if my view is correct) that he felt himself bound when he should not have felt himself to be bound.

That really concludes the matter so far as this stage of the case is concerned, but there yet remains the question of what ought to be done in the circumstances. The position is this. An applicant before the learned county court judge claims 5*s*. 2*d*. a week on the basis of partial incapacity from Mar. 19, 1935. The learned judge has dismissed that application on the ground that he was bound by this certificate. In our view this certificate does not so bind him, but it is the opinion of the court that some determination of the question whether the man is now suffering from an incapacity due to the accident is necessary, in order that the whole matter may be decided as the parties, by referring the matter to medical arbitration, clearly wished it to be decided. The exact language may be considered hereafter. In other words, we agree with the registrar that the certificate is indecisive, but we do not agree with the methods which he has chosen to cure that insufficiency. Therefore it is necessary that the certificate be made explicit. On more than one occasion—I will instance one : *Connor* v. *Cadzow Coal Co., Ltd.* (1)—the House of Lords and this court also have thought fit to send back a certificate to a medical referee to ask what he means, and if necessary, as in *Connor* v. *Cadzow Coal Co., Ltd.*, (1) to ask him a specific question to

which he may give an answer. We think that ought to be done in the present case, but, in so far as this was an application to the medical referee by both parties, we think it right that the parties should in the first instance be given an opportunity of agreeing that question. If they cannot agree, the court will have to formulate it.

I would only add this. Mr. Nelson was prepared to contend here that, even if the certificate did include this third finding—that if the man were only suffering from slight incapacity as a result of the accident he would be fit for his ordinary work as a dataller—he was entitled to judgment after this arbitration. We think that, in the circumstances, the certificate not being in its present form valid, that submission is now open to him. It will, however, be open to him, when the case is returned with a full explanation of the medical certificate, to argue that or any other matter which he thinks may properly be raised on that certificate, together with the answer which we think should be made with regard to the matters now uncertain.

GREENE, L.J.: I agree, and have very little to add. The reference to the medical referee in this case was a reference by consent, and the terms of the reference were not confined to the rather bald questions referred to in sect. 19 of the Act and in the relevant Form 49 under the rules. The parties by consent formulated for the medical referee certain subsidiary or explanatory questions which they desired to have answered. The registrar, when the certificate came to him, took the view that it did not fully and completely answer those questions, and he formulated accordingly a further subsidiary question in order to elicit from the medical referee a full answer to the matters which had been originally put to him. It is to be observed that, the whole jurisdiction of the medical referee being based on consent, the parties are entitled to have put before him the relevant questions in the form which they agree. Everybody knows that the answer to a question very often depends largely on the precise language in which it is couched, and it might very well have been that, if the parties had discussed this question, one or other of them might, while agreeing on the justice of putting it in some such form, have objected to the wording or required the addition of a supplemental question to clear up the point still further. It seems to me that, if there are any supplemental questions to be addressed in a case such as this, it is not for the registrar, however benevolent his action may be, to frame those questions. It is for the parties to frame them, if they can agree; if, on the other hand, they cannot agree, and one party is maintaining that the certificate as it stands is adequate, then, when the matter comes before an arbitrator, the arbitrator will have to satisfy himself whether the certificate is or is not ambiguous. If it is ambiguous, he has jurisdiction to send it back to the referee to clear up the ambiguity. But it is not for the registrar to formulate the questions.

Mr. Cave pointed out—and, I think, pointed out with justice—that the question itself as formulated by the registrar does not as a matter of construction go beyond the scope of the original questions. He also pointed out that the answer was not an answer to something which did not fall within the original questions. On that, he argued that the learned county court judge was entitled to treat the last answer of the referee given to the registrar's question as part of the certificate. In my opinion that argument is untenable, for the reason which I have given: that there is no jurisdiction conferred on the registrar to formulate the questions. Mr. Nelson asked us at one stage to deal with the matter on the footing, not merely that that answer was to be struck out of the document, but also that the court must put from its mind the fact that this question was ever asked and that answer was ever given. If the court were to act in that way it would, in my judgment, be stultifying itself because it would be shutting its eyes to what is now apparent to it: that the medical reference did not really appreciate the full meaning of the question put to him. For this court, with that knowledge, to treat this certificate as conclusive evidence under the section would lead to a very serious injustice.

Scott, L.J.: I agree, and have nothing further to add.

Adjourned sine die. *Medical referee's report to be remitted to him for an answer to the following questions, formulated by the court:*

Whether his certificate means that: (*a*) the effects of the accident are partly though slightly responsible for the applicant's unfitness to resume his original employment as a dataller; or (*b*) the effects of the accident by themselves are insufficient to make him unfit to resume that employment. If the answer to (*a*) is in the affirmative, what work would he be fit for if all capacity other than that due to the accident were disregarded?

Solicitors: *Burn & Berridge*, agents for *James Wilson & Kinsey*, Wigan (for the appellant); *Gregory, Rowcliffe & Co.*, agents for *Peace & Ellis*, Wigan (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

ROBINSON BROTHERS (BREWERS), LTD. *v.* ASSESSMENT COMMITTEE FOR HOUGHTON AND CHESTER-LE-STREET ASSESSMENT AREA.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and du Parcq, JJ.), **April 1, 1936.**]

Rates—Assessment—Licensed property—"Tied house".

A firm of brewers following the usual custom at the present time, instead of letting a public house to a tenant, put a manager in charge of it. The house was in effect a tied house, and it was admitted that brewers were prepared to pay a higher rent for houses in which a manager could be placed in this way. The rating authority assessed the house at a higher figure on these grounds :—

HELD : the principle enunciated in *Bradford-on-Avon Assessment Committee* v. *White*, [1898] 2 Q.B. 630, applied to a house in which a manager was placed as well as to a house sub-let; and the property was not to be assessed at a higher figure than the annual value obtainable in the market, although a brewer might, for considerations personal to himself, be willing to pay a rent in excess of that figure.

[**EDITORIAL NOTE.** For many years when brewers purchased a public-house and desired to attach a "tie" thereto, they let the premises to a tenant, introducing the "tie" into the lease. Of recent years brewers have preferred to effect the same purpose by placing a manager in the house rather than by letting or sub-letting it. In either case the brewers would be willing to give a higher price for premises to which a tie could be attached, but it is here decided that the additional value thereby placed upon the property arises from considerations personal to the brewer and should be excluded in assessing the annual value for rating purposes.

AS TO THE RATING OF LICENSED PROPERTY, see HALSBURY, 1st Edn., Vol. 24, Rates, p. 41, para. 73 ; and FOR THE CASES, see DIGEST, Vol. 38, pp. 566, 567, Nos. 1047-1055.]

Cases referred to :

(1) *Bradford-on-Avon Assessment Committee* v. *White*, [1898] 2 Q.B. 630 ; 38 Digest 567, *1052*.
(2) *Dodds* v. *South Shields Poor Law Union Assessment Committee*, [1895] 2 Q.B. 133 ; 38 Digest 565, *1041*.
(3) *Great Western Railway Co.* v. *Mostyn (Owners), The Mostyn*, [1928] A.C. 57 ; Digest Supp.
(4) *Cornelius* v. *Phillips*, [1918] A.C. 199 ; 30 Digest 184, *515*.
(5) *Smith* v. *Birmingham Churchwardens* (1889), 22 Q.B.D. 703 ; 38 Digest 523, *719*.
(6) *R.* v. *London & North Western Railway Co.* (1874), L.R. 9 Q.B. 134 ; 38 Digest 543, *878*.
(7) *Great Central Railway Co.* v. *Banbury Union, Sheffield Union* v. *Great Central Railway Co.*, [1909] A.C. 78 ; 38 Digest 543, *875*.
(8) *R.* v. *London School Board* (1886), 17 Q.B.D. 738 ; 38 Digest 522, *713*.

CASE STATED by the Court of Quarter Sessions for the County of Durham under the Rating and Valuation Act, 1925, ss. 31 and 32, raising the question of the assessment of a public-house which was occupied by a firm of brewers through a manager.

A. S. Comyns Carr, K.C., and *Frederick Grant*, for the appellants: This case is distinguishable from *Bradford-on-Avon Assessment Committee* v. *White* (1), where the facts were different. In this case, the public-house was occupied by the brewers through a manager; in the earlier case the brewers were letting to a tenant under a tied agreement. The two learned judges in the court which decided *Bradford-on-Avon Assessment Committee* v. *White* (1) did not arrive at their decision on the same ground, although they both agreed as to the decision to be given. The whole question is what persons are to be considered within the ambit of hypothetical tenants. Whether there are or are not good reasons for excluding the sub-letting brewer, there is no good reason for excluding the occupying brewer. It is a common experience in the letting of shops that multiple shop proprietors are prepared to pay much higher rents than traders occupying only a single shop. The brewer is in the same position as a manufacturer or wholesaler who takes a number of shops to dispose of his goods. We accept the proposition that it is necessary to find the market value. Our contention is that the people who would give the best price have been excluded from the market and there is no justification for excluding them. So far as *Bradford-on-Avon Assessment Committee* v. *White* (1) has made an inroad upon principle, it must be accepted in this court, but the decision should not be extended. The motive of the brewer is not a matter which ought to be excluded, and there is no reason for limiting the effect of the brewers' competition to a sum which somebody not a brewer would give. Full effect should be given to the competition of the brewer, and there is nothing in *Bradford-on-Avon Assessment Committee* v. *White* (1) which, on the facts of the present case, prevent that being done. [Counsel also referred to *Great Western Railway Company* v. *Mostyn (Owners)* (3); *Cornelius* v. *Phillips* (4); *Smith* v. *Birmingham Churchwardens* (5); *R.* v. *London & North Western Railway Co.* (6); *Great Central Rly. Co.* v. *Banbury Union* (7); *R.* v. *London School Board* (8).]

A. M. Latter, K.C., and *Michael E. Rowe*, for the respondents, were not called upon.

Lord Hewart, L.C.J.: This is a case stated by the court of quarter sessions for the County of Durham, under the Rating and Valuation Act, 1925, ss. 31 and 32. The matter arose from an appeal from the assessment committee to the court of quarter sessions last year. The company, who were the appellants, appealed against a decision given by the respondents, the assessment committee, because they had refused to make an order to reduce the assessment relating to certain premises of the appellants. The company, on Dec. 1, 1934, had made a proposal, under the Rating and Valuation Act, 1925, for the reduction of the assessment of a public-house called the White Lion Hotel. The assessment was £112 gross and £95 rateable. The assessment was not

reduced. Thereupon the appellants appealed to quarter sessions. The quarter sessions came to a decision subject to this case, which was stated for the decision of this court. The matter is capable of precise expression. The premises in question fall within the twofold category of what are popularly known as tied houses. In one set of cases the tied house is occupied by a tenant for reasons which are stipulated, and in the other class of cases the tied house is occupied by a manager who is a servant of the brewery company. Now, it could not be contended for the purposes of that proposal that, in fixing the rent that the hypothetical tenant from year to year might be reasonably expected to pay, brewers, and the competition of brewers, ought to be excluded. But what was contended was that their competition, or a probability that they would become tenants, was to be taken into account subject only to this: to the extent to which the market value might be affected. The contention of the respondents on the facts is in the case and it is unnecessary for me to read it. The court decided that in estimating the gross value they ought to exclude from consideration the special price which brewers might give, owing to personal considerations, except so far as the possibility of such special price raises the market value generally. Every word of this is important. It was not contended that the brewers ought to be excluded. It was not contended that the special price ought to be excluded. Nor was it contended that the special price which brewers might give for personal considerations ought to be excluded. Nor was it contended that this special price arising from personal considerations and not arising from the value of the premises ought to be excluded, except so far as they raise the market value generally. The price—the quantum—to be ascertained is the market value. The court of quarter sessions accepted that contention and decided in favour of the tenants. They were there the appellants. The court says:

> We were of the opinion that we were bound to follow the decision of the Divisional Court in the case of *Bradford-on-Avon Assessment Committee* v. *White* (1) and accordingly we allowed the appeal and fixed the gross value of the hereditament at £95. If we were not so bound, other considerations would apply.

In my opinion that view is absolutely correct. The justices were following and were not extending what is laid down in the case of *Bradford-on-Avon Assessment Committee* v. *White* (1). What is it that this case finds? There the brewery company were not in occupation themselves, but were letting to a tenant under a tied agreement, and what was contended was that the special value which the brewers gave because they employed or were about to employ the premises as a tied house was not a measure of the true rateable value. I read para. 7 of the case stated in *Bradford-on-Avon Assessment Committee* v. *White* (1). It says:

> Upon the hearing of the appeal it was alleged that in recent years there had been

great competition among rival firms of brewers in the district of Bradford-on-Avon and elsewhere for the purchase or renting on lease of licensed houses for the purpose of letting or sub-letting them to tenants as tied houses, and of thereby increasing the sale of their beer to such tenants.

There the question arises for the purpose of letting or sub-letting to a tenant. Here a manager has been appointed to occupy the premises on behalf of a brewery company. In my opinion, on the question of principle, there is no difference whatever between that form of tied house where there is sub-letting to tenants and that form of tied house where they employ a manager. In the case of *Bradford-on-Avon Assessment Committee* v. *White* (1), the court held that it was a hereditament independently of and without reference to any personal contract that had to be observed; a free house treated as occupied by a tenant from year to year unfettered by any personal contract. So the court arrived at a particular conclusion. The question was whether the decision arrived at in that way was right. This court held that it was right and that the principle that it had applied was right. That was made quite clear in a certain part of the judgment of Channell, J. It is not necessary to read much of it. On page 637, Channell, J., says:

> The Act of 1836 says nothing about the hypothetical tenant occupying. The purpose for which a particular tenant wants the premises may possibly induce him to pay more than the market value for them; but, unless that is the case, the purpose for which the tenant wants the premises has nothing to do with the matter, except in this way—that property is to be rated, as it is said, *rebus sic stantibus*—that is to say, a public-house is to be rated on the assumption that it continues a public-house, and the question is not to be entered into as to whether a higher rent could be got for it by turning it into a bank, or an insurance office, or any other kind of business premises. To introduce the purpose for which the tenant is about to use the premises, and to consider whether that purpose is to carry on the trade himself, or to underlet it to someone else to carry it on, seems to me to introduce extraneous considerations somewhat similar to those which it was attempted unsuccessfully to introduce in *Dodds* v. *South Shields Assessment Committee* (2).

That case seems to me to have precisely the same force here. On page 638, Channell, J., says this:

> I think that any circumstances which affect the annual value in the market must be taken into consideration in arriving at the gross estimated rental—that is, at the sum which may reasonably be expected to be obtained from a tenant from year to year; and therefore the demand which exists for public-houses, whether by brewers or others, must be considered, for that demand directly affects the value. . . . Any sums which are paid by the tenant, not by reason of the value of the premises, but for reasons personal to himself, ought not to be taken into account.

There is a clear contrast. On page 639, Channell, J., says:

> The contention of the respondents, which is stated in para. 12 of the case, appears

to me to be correct, subject only to the doubt as to what is meant by the "competition of brewers being taken into consideration." . . . If, however, it means that the special values which the brewers may, for reasons connected with their own business, be willing to give are to be treated as the gross estimated rental of the premises, because those sums might be obtained from brewers, then, in my opinion, it is wrong.

And on page 640:

the paragraph continues "but treating them, like other tenants from year to year, as tenants of an hereditament unfettered by any personal contract." That statement is not quite clear. The brewers would not in any case be fettered by a personal contract, and the house is necessarily free when they take it. It probably means, not taking into account any sums over and above market value, which the brewers might be willing to give for purposes of their own to carry out their object of making it a tied house.

In my opinion the principle laid down is no less applicable where the machinery employed by the brewers is employed through a manager and not by a tenant. Those who are assessing the rates must not take into account any sums over and above market value which the brewers might be willing to give for purposes of their own for carrying out their purpose of making the house a tied house. In my view, what the court below was asked to do was to follow the decision in *Bradford-on-Avon Assessment Committee* v. *White* (1), the difference between tied houses with a manager and those which are in the hands of a tenant being immaterial. Taking that view, I think that the court of quarter sessions came to a correct conclusion and that the principle laid down very clearly in the judgment of CHANNELL, J., in *Bradford-on-Avon Assessment Committee* v. *White* (1) applies exactly to the present case. Therefore this appeal fails.

HUMPHREYS, J.: I agree.

DU PARCQ, J.: I agree. I feel that no doubt we are bound by the decision in *Bradford-on-Avon Assessment Committee* v. *White* (1), and I have no regret at finding myself so bound because, if I may say so with great respect, it seems to me that the judgments in that case were in accordance with principle. If one looks for a moment at the Act, and considers this case apart from authority, one finds this. What the Act says is that the premises are to be rated at the sum at which the premises might reasonably be expected to let from year to year. The hereditament in this case is a public-house. What is to be considered is the value of that public-house to owners. What may one expect to get from it from tenants from year to year? It happens in this case that the house is occupied by brewers who carry on business there through a manager. The rateable value should be just the same where the house is occupied by brewers who carry on through a manager or whether it is

carried on by a tenant of brewers or whether the house is carried on by a licensee who is independent of any brewers. The only question is that a tenant from year to year would be likely to pay less. It appears in this case that it is very common in these days to find public-houses in the assessment area in question owned by brewers and either managed by them or sub-let to tied tenants. That is clearly a matter of importance to the owner of premises of this kind. He is entitled to say, when he is seeking a tenant for the premises, that there is at any rate a possibility and it may be a probability that he will find brewers who will carry on the business through a manager. No owner would say that that was a certainty and any owner of premises, however excellent they might be, if he were disposed to think he was certain to find such a tenant, might be disappointed. It seems to me that quarter sessions would clearly be wrong if they said that brewers must be found who would be able and willing to pay more. We must not overlook the possibility that such tenants would be found and we must not forget the possibility that may amount to a probability that brewers will come forward and anticipate that they will make a large profit if they carry on through a manager. That point is separated by quarter sessions in this case. If one looks at para. (*f*), it is seen that they have excluded from consideration the competition of the brewers and the rent which brewers might be expected to give because they would secure the premises and a larger output and profit, except so far as the possibility of such profits might raise the rents offered by a tenant not influenced by such reasons. They did not exclude the fact that there are such potential tenants keeping up the rents of premises of that kind. If the case is read as a whole, it seems that no relevant matter has been excluded from consideration and I should have thought, apart from authority, that the decision was right. But I agree with my Lord that we are bound by authority, for it seems to me that the judgment of Channell, J., in *Bradford-on-Avon Assessment Committee* v. *White* (1) covers this case, and I am not in agreement with the argument of Mr. Comyns Carr that there is a substantial difference between the views of Ridley, J., and Channell, J. [His Lordship referred to the judgments]: I have no doubt that if Ridley, J., had been confronted with the facts in this case instead of the case before him, he would have said that the value of the hereditament is not to be affected by conditions which do not affect the property. The conditions here are that the brewers are occupying the premises and carrying on business there through a manager and are able to secure a larger output and the profits thereon. I see no difference in principle between the learned judges so far as that case is concerned, and I think that the headnote accurately sets out the principle, and the difference between a tied house occupied by a tenant and one being carried on by a manager for

brewers is an irrelevant consideration. For these reasons, I agree with my Lord that the appeal should be dismissed.

Solicitors : *Richardson, Sadler & Co.*, agents for *Hannay & Hannay*, South Shields (for the appellants) ; *Godden, Holme & Ward* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re STILLWELL, STILLWELL *v.* STILLWELL.

[CHANCERY DIVISION (Bennett, J.), **March 25, 1936.**]

Lunatics—Surrender of property under order of the court—War savings certificates—Nomination—Succession to fund in court on death of lunatic —Lunacy Act, 1890 (*c.* 37), *s.* 123 (1).

S., in accordance with the War Savings Certificate Regulations, Nos. 28 and 29, duly nominated E. A. S. to receive at his death the whole amount due to him in respect of certain war savings certificates. An order was subsequently made under the Lunacy Act, 1890, authorising the receiver of S., who had become a lunatic, to surrender the war savings certificates to the Post Office and to have the amount payable in respect thereof lodged in court. S. died intestate, and a summons was taken out to determine whether the sum in court was payable to E. A. S. or whether it represented part of the estate of S. :—

HELD : the surrender of the certificates and the payment into court of the proceeds were a disposition by the receiver within the Lunacy Act, 1890, s. 123, and E. A. S. was entitled to the sum in court.

[**EDITORIAL NOTE.** The point taken in this case is that the order of the Master in Lunacy ordering the surrender of the certificates did not amount to a disposition within Lunacy Act, 1890, s. 123. There was in truth no sale of the property, but the effect of the order was to convert securities into money. It has been held that a conversion by the order of the court of money into securities is not within the section, but apparently whenever securities or property other than money are converted in money that is a " disposition " within the section.

FOR THE LAW AFFECTING SUCH DISPOSITIONS, see HALSBURY, 1st Edn., Vol. 19, Lunatics, p. 449, para. 928, and FOR THE CASES, see DIGEST, Vol. 33, pp. 215-217, Nos. 1228-1242. FOR THE LUNACY ACT, 1890, s. 123 (1) see HALSBURY'S COMPLETE STATUTE OF ENGLAND, Vol. 11, p. 65.]

Case referred to :—

Re Walker, Goodwin v. *Scott*, [1921] 2 Ch. 63 ; 44 Digest 404, *2358*.

ADJOURNED SUMMONS to determine whether, in the events which had happened and on a true construction of the Lunacy Act, 1890, s. 123, a sum in court representing the amount of the proceeds of the sale of certain war savings certificates passed to the defendant Emma Anna Stillwell or whether it represented part of the estate of the deceased, who died a lunatic and intestate.

Neville Faulks for the plaintiff.

Roger Turnbull and *Acton Pile* for the defendant Emma Anna Stillwell.

G. P. Slade for the defendant Gloria Ethel Ada Hornibrook.

Bennett, J.: The late Edward Alfred Stillwell died intestate on Feb. 20, 1934. The plaintiff is his administrator. In the year 1929 the deceased was possessed of war savings certificates of the value of £500 odd, and the rights of the parties who possess war savings certificates are governed by the War Savings Certificate Regulations, 1919. These regulations, by regulations Nos. 28, 29 and 30, enable the holder of the certificates to nominate persons to receive any sum repayable in respect of the certificates upon his death. On Oct. 2 the deceased executed a nomination in writing in the prescribed form whereby he nominated Emma Anna Stillwell, his sister, to receive at his death the whole of the amount then due to him in respect of the war savings certificates held by him in his sole name at the date of his death. That nomination was signed in accordance with the regulations in the presence of a witness and was sent to the Controller of the Money Order Department.

On Apr. 25, 1933, an order was made under the provisions of the Lunacy Act, 1890, appointing the defendant Emma Anna Stillwell receiver' of the property of the lunatic Edward Alfred Stillwell. By that order it was provided that the receiver was authorised and directed to surrender to the Post Office the war savings certificates belonging to the patient and to request the proper officer of the Post Office to lodge in court the amount payable in respect thereof. In pursuance of that order the receiver surrendered the war savings certificates and a sum of £580 10*s.* 11*d.* was paid into court in respect of them, which was invested in the purchase of £577 2*s.* 9*d.* 3½ per cent. War Stock, the interest on which was paid through the receiver during the lifetime of the deceased.

The present summons asks that it may be decided whether the sum in court, representing the amount of the said certificates, passes to Emma Anna Stillwell under the nomination made by the deceased, or whether it forms part of the estate of the deceased upon the footing that there was no disposition of it by the deceased. The question turns upon the true construction of the Lunacy Act, 1890, s. 123. which provides that:

> (1) The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition, under the powers of this Act, which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition, had been made, and the surplus moneys, shall be of the same nature as the property sold, mortgaged, or disposed of.

The point taken on behalf of the defendant Gloria Ethel Ada Hornibrook, who contends that the proceeds of sale of the national war savings certificates are part of the estate of the deceased, is this, that

what was done under the order of the Master in Lunacy was not "a disposition" within the meaning of the Lunacy Act, s. 123, and Mr. Slade relies, in support of his argument, upon a decision of RUSSELL, J., in *Re Walker, Goodwin* v. *Scott* (1). In my judgment that argument is not well founded. I regard the war savings certificates as being in substance investments made by the deceased, and I regard what was done under the order of the Master in Lunacy as being in effect a disposition by the receiver under the powers of the Lunacy Act, 1890. And, upon that view of what was done, the section, as it seems to me, applies, with the result that the defendant Emma Anna Stillwell is entitled to the property in question. The costs will be paid out of the estate.

Solicitors: *Brash Wheeler, Chambers, Davies & Co.* (for the plaintiff and for the defendant Gloria Ethel Ada Hornibrook); *Ford, Michelmore, Rose & Wilkins*, agents for *Greenland, Houchen & Co.*, Attleburgh (for the defendant Emma Anna Stillwell).

[*Reported by* C. M. YOUNG, *Barrister-at-Law.*]

COMMISSIONERS OF THE ANCHOLME DRAINAGE AND NAVIGATION (now known as THE ANCHOLME DRAINAGE COMMISSIONERS) *v.* T. P. WEDHEN (H.M. INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Lawrence, J.), **March 27, 30, 1936.**]

Income Tax—Exemption—By statute—Public Act expressed in general terms—Ancholme Drainage Act, 1767.

By the Ancholme Drainage Act, 1767, the navigation, towing paths, etc., thereby authorised were to be free to all persons upon payment of the tolls authorised by the Act and all taxes, tolls, etc., raised were to be "exempted from the payment of any taxes, rates, assessments or impositions whatsoever; any law or statute to the contrary notwithstanding." The Ancholme Drainage Commissioners were assessed for income tax, in respect of these tolls, the Crown contending that the Act was purely local and that the exemption referred only to local taxes:—

HELD: in the absence of express words of limitation the exemption referred to both local and general taxes, and the tolls were not liable to income tax.

[**EDITORIAL NOTE.** Exemptions from taxation so long as they have been granted in general terms have been held wide enough to include exemption from income tax, and this has been so held even in cases where the legislation containing the exemption has been passed before the introduction of income tax. In the present case it was sought to limit the exemption to local impositions because the Act containing the exemption was dealing with a purely local matter, but this contention on the part of the Crown did not find favour with the court.

FOR EXEMPTIONS FROM INCOME TAX, see HALSBURY, Hailsham Edn., Vol. 17, p. 21, para. 34; and FOR CASES, see DIGEST, Vol. 28, pp. 91, 92, Nos. 542-544.]

Cases referred to :—

(1) *Pole-Carew* v. *Craddock*, [1920] 3 K.B. 109 ; 7 Tax Cas. 488 ; 28 Digest 92, *543*.

(2) *Argyll* (*Duke*) v. *Inland Revenue Com's.* (1913), 7 Tax Cas. 225 ; 28 Digest 92, *544*.

(3) *Associated Newspapers, Ltd.* v. *London Corpn.*, [1916] 2 A.C. 429 ; 38 Digest 475, *350*.

Case stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

J. Millard Tucker, K.C., and *Sutton-Nelthorpe* for the appellants.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondent.

Lawrence, J. : In this case I have to construe an exemption conferred under the Ancholme Drainage Act, 1767, upon the appellants. The terms of the exemption are as follows :

> Be it enacted. . . . That the navigation and the works, towing paths, and haling ways hereby authorised to be made and set out, shall be free for the use of all persons, and their boats, vessels and horses upon payment of such tolls as shall be appointed to be taken by virtue of this Act ; and that all taxes, tolls, rates and duties, to be raised by virtue of this Act shall at all times hereafter be exempted from the payment of any taxes, rates, assessments or impositions whatsoever ; any law or statute to the contrary notwithstanding.

The commissioners have held that :

> The decided cases seem to lay down that the words must be looked at in connection with the subject matter of the Act in which the exemption is contained, and also in connection with the context in which it occurs.

Of course, I quite agree with that as being a principle of the ordinary interpretation of statutes. Then it goes on :

> If this test is applied it appears that, on the facts of this case, the exemption must be restricted to exemption from local taxation. It must also be noted that in the Act of 1767, the words "Parliamentary or parochial" do not appear. In the case of *Pole-Carew* v. *Craddock* (1), the Lord Justices appear to have attached great importance to these words in arriving at their decision.

I am unable to agree with the commissioners when they say that if the subject of the Act and the context are considered the exemption must be restricted to an exemption from local taxation. It is argued for the Crown that the whole object of the Act was local, that there were local commissioners, that it was a local purpose, and it was for the benefit of the locality, and that the presumption in these circumstances is that the exemption was intended to be from local burdens. But in my opinion the object of the Act, although local in one sense, was not local in another. One of the primary considerations appears to me to be the provision in this very section of the Act that the navigation of the River Ancholme should be free. It is, according to the statements in the case, a river

which has been navigable and of some importance so far back as the thirteenth century, and this Act was passed in 1767.

The Attorney-General distinguished between the preamble to this Act and the preamble in the Pole-Carew Act, and argued that it appeared from the preamble to this Act that the public therein referred to was the local section of the public which lives in Lincolnshire, and that that section of the public was contrasted with the owners of lands within the level, whose lands were to be drained; whereas in the Pole-Carew Act, according to his argument, the public which was referred to was a wider public. I am unable to accept that contention. I think that when the subject dealt with is a navigable river which leads quickly to the sea, there is no reason for reading the expression in any such limited sense. The object of this Act was said to be of great utility to the public and by the preamble of the statute itself was made a public statute. In those circumstances I have to construe the words "any taxes, rates, assessments, or impositions whatsoever" and those words are, in my opinion, words of the widest possible import, apt to cover either Parliamentary or parochial taxes or other impositions. It is perfectly true that there may be something in the context to limit them, but I can see nothing in the context or in the object of this Act to limit those general words.

A number of cases have been cited to me which I do not think it is necessary for me to review in detail, but it is common ground that no case, with the exception of the *Duke of Argyll's* case (2) has been decided, where the exemption has been read as applicable to Parliamentary taxes, except where the statute has exempted in terms from Parliamentary or parochial taxes. But it is also equally true that there is no case where the general words such as these which are used in this case have been limited to apply only to parochial rates, taxes or assessments, except cases where there has been held to have been a special bargain between the promoters of the Act and the persons to be benefited by the exemption; cases for instance such as the *Associated Newspapers* v. *London Corporation* (3). It is not suggested that there was any such bargain in this case and therefore I have to construe these most general words without any such consideration as that. The fact that the words "Parliamentary or parochial" are not present in the statute does not seem to me to suggest any reason why I should limit the generality of the words. I think that some support is given to the view that I am taking of these words by the words which follow: "Any law or statute to the contrary notwithstanding." Those words generally are equally general, and there is also the provision in a later part of the Act that warrants, mortgages, assignments, transfers or other writings shall be exempt from stamp duties. And although that does not occur in the same group of clauses as the exemption which I am now considering, it

seems to me to support the view that the legislature was treating this work of drainage and navigation as a work of general public importance, which was to be exempted from taxes which were not only merely local but which were Parliamentary taxes imposed by the national Parliament.

For these reasons I am unable to agree with the commissioners in this case and I hold that the exemption does apply to income tax, and the appeal will therefore be allowed with costs, and I order repayment of assessments at the rate of 3 per cent.

Solicitors: *Collyer-Bristow & Co.*, agents for *A. A. F. Stubbs*, Brigg, Lincolnshire (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

COMMISSIONERS OF INLAND REVENUE *v.* CROSSMAN AND OTHERS,

COMMISSIONERS OF INLAND REVENUE *v.* MANN AND OTHERS.

[House of Lords (Viscount Hailsham, L.C., Lord Blanesburgh, Lord Russell of Killowen, Lord Macmillan, Lord Roche), **January 24, 27, 30, and March 27, 1936.**]

Estate duty—Shares in company—Restrictions on alienation—Basis of valuation for estate duty purposes—Finance Act, 1894 (*c.* 30), *s.* 7 (5).

By the articles of association of a company a male holder of ordinary shares was given limited powers of transferring such shares *inter vivos* or appointing them by will to any of his relations specified in the articles subject to the transferees or appointees attaining the age of twenty-five years and being approved by the directors. Otherwise a member, or his personal representative, proposing to transfer any ordinary share was required to give written notice of transfer to the company which enabled the company to offer the shares to other members holding one or more ordinary shares at a prescribed price ascertained in accordance with the articles. If, within three months of the service of the transfer notice, the company failed to find a purchaser, the proposing transferor was permitted to sell the shares during the succeeding three months to any person and at any price. The prescribed price in the articles was much below the value of the shares if free from all limitations and restrictions. Estate duty in respect of ordinary shares which passed on the respective deaths of two male shareholders was duly paid by their executors upon the basis of the prescribed price fixed in conformity with the articles:—

Held (Lord Russell of Killowen and Lord Macmillan dissenting): the value of the shares was to be fixed at the price they would fetch in the open market, on the terms that the purchaser would be entitled to put upon the register as holder of the shares and hold them subject to the provisions of the articles; but that trust companies should be disregarded as possible buyers as the higher price obtainable from trust companies was due to the special needs of trust companies and was not a normal factor in the ascertainment of the ordinary market price.

[EDITORIAL NOTE. Where shares are freely transferable there is no difficulty in fixing their value on the basis of transactions taking place at or about the time of the death of the deceased. In the case of private companies, there is often a restriction on alienation, and in the present case there was a severe restriction on the alienation of the ordinary shares of a public company. The method of valuation of such property for the purposes of estate duty has been the subject of some difference of judicial opinion, and the matter is here decided only by a majority in the House of Lords reversing a majority decision in the Court of Appeal. However, the result is in accordance with the practice of the Estate Duty office for some thirty years founded on the Irish case of *A.-G.* v. *Jameson*, [1905] 2 I.R. 218; 21 Digest 24, case (*m*), which is not to ignore altogether the restrictions placed upon the share; but to ascertain the price that could be realised on a sale subject to those restrictions, assuming that on such sale, it was open to any member of the public to purchase. In general, where the articles of the company "prescribe" a price, that price is not the value for estate duty purposes, unless, perhaps, in the case where the executors are bound to sell at the prescribed price.

FOR VALUATION OF SHARES FOR ESTATE DUTY, see HALSBURY, Hailsham Edn., Vol. 13, p. 271, para. 275; and FOR CASES, see DIGEST, Vol. 21, p. 24. FOR THE FINANCE ACT, 1894, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 8, p. 120.]

Cases referred to:

(1) *Attorney-General* v. *Jameson*, [1904] 2 I.R. 644, [1905] 2 I.R. 218; 21 Digest 24, case (*m*).
(2) *Salvesen's Trustees* v. *Inland Revenue Commissioners*, [1930] S.L.T. 387.
(3) *Cowley (Earl)* v. *Inland Revenue Commissioners*, [1899] A.C. 198; 21 Digest 7, *27*.
(4) *Borland's Trustee* v. *Steel Brothers & Co., Ltd.*, [1901] 1 Ch. 279; 9 Digest 100, *423*.
(5) *Poplar Metropolitan Borough Assessment Committee* v. *Roberts*, [1922] 2 A.C. 93. 38 Digest 520, *698*.
(6) *Attorney-General* v. *Beech*, [1899] A.C. 53; 21 Digest 7, *26*.
(7) *Bradford Banking Co.* v. *Briggs & Co., Ltd.* (1886), 12 App. Cas. 29; 9 Digest 86, *343*.
(8) *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426; 5 Digest 751, *6483*.
(9) *Re Cassel, Public Trustee* v. *Mountbatten*, [1927] 2 Ch. 275; Digest Supp.
(10) *Christie* v. *Lord Advocate*, [1936] 1 All E.R. 443.
(11) *Port of London Authority* v. *Orsett Union Assessment Committee*, [1920] A.C. 273; 38 Digest 563, *1017*.

APPEALS from two orders of the Court of Appeal reversing (by a majority in each case) two decisions of FINLAY, J. The history of the proceedings, the facts, and the arguments are fully referred to in the judgments.

The Attorney-General (Sir Thomas Inskip, K.C.), the Solicitor-General (Sir Donald Somervell, K.C.), and *J. H. Stamp* for the appellants.

Gavin T. Simonds, K.C., Cyril J. Radcliffe, K.C., and *D. Ll. Jenkins* for the respondents.

VISCOUNT HAILSHAM, L.C.: My Lords, these two appeals involve the same question, namely, what is the proper basis of valuation for purposes of estate duty of shares in a limited company where the right to transfer

is restricted by the articles of association. The company involved in these two cases, Mann, Crossman & Paulin Ltd., was incorporated in 1901 to take over and carry on an old family business of brewers. It has a paid up capital of £2,250,000, divided into 125,000 5 per cent. preference shares of £10 each and 10,000 ordinary shares of £100 each. The shares with which we are concerned in these two cases are ordinary shares. The relevant article is in the following terms :—

Art. 34 (1) A male holder may at any time transfer any one or more of his said ordinary shares to any of his sons daughters or grandsons (being sons of sons) or brothers or nephews (being sons of brothers) and being of the age of 25 years at the least, and being in other respects in the opinion of the directors duly qualified for membership.

(2) A male holder may by his will or any codicil thereto appoint any one or more of his ordinary shares to any of his sons daughters or grandsons (being sons of sons) or brothers or nephews (being sons of brothers) and, being at the time of his death of the age of 25 years at the least ; and any such appointee shall be entitled to a transfer of the shares from the legal personal representatives of the appointor, provided that the directors within three months after the death of the appointor signify their approval of the transferee.

(3) A male holder may by his will or any codicil thereto appoint any one or more of his ordinary shares to any of his sons daughters or grandsons (being sons of sons) or brothers or nephews (being sons of brothers) and who may at the time of his death be under the age of 25 years on the footing that the appointment is only to take effect as and when the appointee attains the age of 25 years, and may in like manner make provision as to the application of the interim income arising from such shares for the benefit of the appointor's widow (if any) and any child or children or remoter issue or brother or nephew (being a son of a brother) of the appointor or some or one of them. And in default of and subject to any such provision such interim income shall be applied in such manner as the legal personal representatives of the appointor shall think fit for the benefit of any such person as aforesaid. Any such appointee shall on attaining the age of 25 years be entitled to a transfer of the shares from the legal personal representatives of the appointor, provided that the directors within three months after he becomes so entitled signify their approval of him as transferee.

(3*a*) the ordinary shares held by any person who shall have acquired his holding under sub-clause (1), (2) or (3) of this clause and (*a*) who has no issue, or (*b*) who dies without having disposed of his ordinary shares pursuant to sub-clause (2) or (3) hereof, may, and in case of the death of such holder without having disposed thereof shall, be offered to the company pursuant to the sub-clauses (6) to (14) (*c*) hereof inclusive or such of the same sub-clauses as may be applicable. Provided always that in the case of ordinary shares held by any person who shall have acquired his holding under sub-clause (1), (2) or (3) of this clause, and who is a daughter of any ordinary shareholder such ordinary shares shall be transferable only pursuant to the provisions contained in the said sub-clauses (6) to (14) (*c*) or such of them as may be applicable.

Sub-clauses (4) and (5) are not relevant.

Notice of Intention to Transfer.—(6) Except where the transfer is made pursuant to paragraphs 1, 2, 3 or 5 of this clause, a member proposing to transfer any ordinary share (hereinafter called " the proposing transferor ") shall give notice in writing (hereinafter called " the transfer notice ") to the company that he desires to transfer

the same. Such notice shall constitute the company his agent for the sale of the share at par value to any member of the company holding any ordinary share or ordinary shares.

(7) The transfer notice may include several ordinary shares, and in such case shall operate as if it were a separate notice in respect of each. The transfer notice shall not be revocable except with the sanction of the directors.

Company's Power.—(8) If the company shall, within the space of three months after being served with such notice, find a member holding an ordinary share or ordinary shares willing to purchase the share (hereinafter called "the purchasing member") and shall give notice thereof to the proposing transferor, he shall be bound, upon payment of the par value to transfer the share to the purchasing member.

Par Value.—(9) In these regulations the par value of any share means a sum equal to the capital paid up thereon.

Default by Proposing Transferor.—(10) If in any case the proposing transferor, after having become bound as aforesaid, makes default in transferring the share, the company may receive the purhcase-money and shall thereupon cause the name of the purchasing member to be entered in the register as the holder of the share, and shall hold the purchase-money in trust for the proposing transferor.

Receipt.—(11) The receipt of the company for the purchase-money shall be a good discharge to the purchasing member, and, after his name has been entered in the register, in purported exercise of the aforesaid power, the validity of the proceedings shall not be questioned by any person.

Default by Company.—(12) If the company shall not, within the space of three months after being served with the transfer notice, find a member holding an ordinary share or ordinary shares willing to purchase the shares and give notice in manner aforesaid, the proposing transferor shall, at any time within three calendar months afterwards, be at liberty (subject to paragraph 14 hereof) to sell and transfer the shares (or those not placed) to any person and at any price.

How Shares to be offered to Members.—(13) If, and so far as practicable, the shares comprised in a transfer notice shall be offered by the company to the members holding an ordinary share or ordinary shares in proportion as nearly as may be to the ordinary shares held by them respectively, and any shares not accepted in response to such offer, shall be offered to the remaining said members in the like proportion. Any share which it is impracticable thus to offer, may be offered to such member or members, whether a director or not, as the directors think fit.

(14) Subject to paragraphs (2) and (3) of this clause the legal personal representatives of a deceased holder of an ordinary share or ordinary shares shall within three calendar months after the death of such holder, serve the company with a transfer notice in respect of the ordinary shares of the deceased, and if default is made in serving such notice within the time aforesaid, the directors shall be at liberty to appoint any person to sign and serve such notice on behalf of the legal personal representatives of the deceased, and a transfer notice signed and served by such person shall be effective.

(14*a*) Provided nevertheless that where under any of the paragraphs (6), (7) or (14) of this clause a transfer notice by or on behalf of any member or legal personal representatives of a member is given to the company as aforesaid in regard to any ordinary share or shares the purchase-money for such ordinary share or shares or for such of them as shall be purchased under this clause shall, in addition to the par value thereof, be—

(*a*) A sum bearing the same ratio to the amount of the company's reserve fund at the date of the giving of the transfer notice as the number of shares purchased aforesaid bears to the whole number of the then issued ordinary shares and

(*b*) A sum bearing the same ratio to the full amount of the profits of that portion of the financial year current at the date of the giving of the transfer notice which shall have elapsed at the date of the giving of such notice as the number of the ordinary shares purchased as aforesaid shall bear to the full amount of the issued ordinary shares and

(*c*) A sum bearing the same ratio to the full amount or value of any other undivided or unapplied profits of any preceding financial year or years (whether or not such profits shall have been carried forward) as the number of the ordinary shares purchased as aforesaid bears to the full amount of the issued ordinary shares and it shall be sufficient in such notice to specify the amount of the purchase-money per share by stating it to be a sum to be fixed in accordance with this clause (No. 34).

The certificate of the auditor of the company as to the amount of purchase-money per ordinary share which in his opinion is payable in any particular case where this clause (No. 34) applies, shall be conclusive as to the amount of that case payable.

The reserve fund named and referred to in sub-paragraph (*a*) of this clause is hereby declared to be the general reserve only (standing on the books of the company on July 25, 1907, at £110,000) less the sum of £34,467 7*s*. on the same date forming part thereof.

General Power to Refuse Transfer.—(15) The directors may refuse to register any transfer of a share, (*a*) where the company has a lien on the share; (*b*) where, in the case of shares not fully paid up, it is not proved to their satisfaction that the proposed transferee is a responsible person; (*c*) where the directors are of an opinion that the proposed transferee is not a desirable person to admit to membership, and that without being bound to assign any reason for such opinion. But paragraphs (*b*) and (*c*) of this clause shall not apply where the proposed transferee is already a member holding more than 250 ordinary shares.

(16) The company may, by special resolution, repeal or alter any of the provisions of this clause, and the last preceding clause, but at the meetings to pass such special resolution, no member shall be entitled to be present or to vote, who is not a holder of an ordinary share or ordinary shares, and the quorum of each such meeting shall be members holding one-fifth at least of the issued ordinary shares

The respondents in the first appeal are the executors of one Percy Crossman deceased; the respondents in the second appeal are the executors of Sir William Thomas Paulin deceased. Mr. Crossman died on Aug. 17, 1929; he was at that time the registered holder of 1,000 ordinary shares in the company. By his will he had disposed of all these shares in favour of relatives under art. 34 (2) and these persons have since become the registered holders of these shares. Sir William Paulin died on Feb. 26, 1931: at the time of his death he was the registered holder of 1,600 ordinary shares in the company. By his will Sir William Paulin gave 500 of these shares to each of his two daughters, who have since become registered holders of these shares. The remaining 600 shares formed part of his residuary estate and on May 14, 1931, his executors served a transfer notice in respect of those 600 shares on the company, in accordance with art. 34 (14). The price fixed under art. 34 (14*a*) was £209 13*s*. 8*d*., and Sir William Paulin's executors accordingly sold and transferred these 600 shares to other members

of the company at that price. The price fixed in accordance with art. 34 (14*a*) in the case of Mr. Percy Crossman would have been £221 4*s*. 5*d*. The company is a very prosperous one and had been paying a dividend at the rate of 45 per cent. annually for some years.

The Inland Revenue Commissioners fixed the value of the shares for estate duty purposes at £475 per share. In each case the executors presented petitions under the Finance Act, 1894, s. 10, and claimed that the shares ought to have been valued at a price fixed in accordance with art. 34 (14*a*). The petitions were heard before FINLAY, J., who considered himself bound by a previous decision of the Irish Court of Appeal in a case of the *A.-G.* v. *Jameson* (1) to accept the basis for which the Inland Revenue Commissioners contended. Subject to a subsidiary point with regard to trust companies as possible purchasers, with which I will deal separately, the learned judge fixed the price at £351 in the case of Mr. Crossman's executors and £355 in the case of Sir William Paulin's executors. From that decision the executors appealed in each case; the Court of Appeal gave judgment on July 27, 1934, and by a majority decided that the proper basis of valuation was the price for which the executors contended and allowed the appeal. From that decision the present appeals are brought.

My Lords, before expressing my own opinion, it is I think convenient to remind your Lordships of the views expressed in Ireland in *Jameson's* case (1). That case dealt with shares in a limited company known as John Jameson Limited in which there were restrictions upon the transfer of shares very similar to those which are involved in the present case. The case was commenced by an information laid by the Attorney-General in Ireland, in which a declaration was asked as to the measure of value of the shares for estate duty purposes. The case was heard originally in the King's Bench Division before PALLES, C.B., KENNY and BOYD, JJ. PALLES, C.B., took the view that the restrictions upon the right to transfer contained in the articles were to be disregarded altogether in assessing the value of the shares and that they were to be valued on the basis that these restrictions were merely collateral and that the shares were to be treated as freely transferable. This view was not accepted by the other two judges, who held that the shares must be valued on the basis that any purchaser in the open market would take subject to the risk of the shares being claimed by existing shareholders at the price fixed by the articles. From this latter view there was an appeal to the Court of Appeal in Ireland, which was heard by LORD ASHBOURNE, L.C., and FITZGIBBON, WALKER and HOLMES, L.JJ. The Court of Appeal rejected both the views which had found acceptance in the court below, and they declared that the value of the shares was to be estimated at the price which they would fetch if sold in the open market on the terms that the purchaser should be entitled to be registered

as holder of the shares and should take and hold them subject to the articles of association, including the articles relating to alienation and transfer.

In Scotland the same point arose for discussion in the case of *Salvesen's Trustees* v. *Inland Revenue Commissioners* (2), and Lord Fleming took the same view as that which had been taken in the Irish Court of Appeal. In view of this conflict of judicial authority, a conflict which, I am sorry to say, prevails even in your Lordships' House, I think it is convenient to begin by referring to the exact language of the Finance Act, 1894, since it is upon the construction of that statute that the question ultimately depends. Sect. 1 provides that:

> In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called "estate duty," at the graduated rates hereinafter mentioned. . . .

Sect. 2 provides that property passing on the death of the deceased shall be deemed to include certain property therein specified; and it has been settled ever since the case of *Earl Cowley* v. *Inland Revenue Commissioners* (3) that these two sections are mutually exclusive. Sects. 1 to 5 together form a group of sections which deal with the grant of estate duty. There follow five sections, 6-10, dealing with the collection and recovery of duty and value of property. Sect. 6 (2) imposes a liability to pay the duty in respect of all personal property of which the deceased was competent to dispose at his death upon the executor. Sect. 7 deals with the value of property and by subsect. (5) provides that

> the principal value of any property shall be estimated to be the price which, in the opinion of the commissioners, such property would fetch if sold in the open market at the time of the death of the deceased.

It is upon the meaning to be attached to this subsection that the whole controversy turns.

In order to reach the right conclusion upon the construction to be placed upon the subsection and its application to the facts of the present case, it seems to be essential to determine what is the property which has to be valued. The respondents contended that the property fell under sect. 2 and not under sect. 1. The argument was that since the rights of the deceased to enjoy the produce of the shares and to dispose of them ceased with his death, the proper view was that no property actually passed on death but that upon the death there came into existence a fresh set of rights, determined by the terms of the article and belonging either to the executors or legatees or other shareholders in the company, which might be deemed to pass under sect. 2, but which did not form part of the property actually passing under sect. 1. I have arrived

at a very definite view that this argument is unsound. I think further that it is inconsistent with the decision in your Lordships' House in the case of *Cowley* v. *Inland Revenue Commissioners* (3). As LORD MACNAGHTEN pointed out in that case at page 213, what the Act has in view for the purpose of taxation is property passing on death, not the interest of the deceased which, if it be a limited interest, can never pass. In my view, the property which passed at the death of the deceased consisted of the shares in the company, and this is not the less true because the terms of the articles limited the rights of the deceased shareholder or of his executors to deal with the shares, and gave certain privileges and rights of pre-emption on his death. If I am right so far, it follows that the commissioners have to estimate the price which the shares would fetch if sold in the open market at the time of the death of the deceased. The Court of Appeal have cited the well-known passage in the judgment of FARWELL, J., as he then was, in *Borland's Trustee* v. *Steel Brothers & Co., Ltd.* (4), at p. 288, as to the nature of a share. It is, as the learned judge there states :

> the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with the Companies Act, 1862, s. 16. The contract contained in the articles of association is one of the original incidents of the share.

This definition seems to me to show with all respect to the opinion of a very learned judge, that the view entertained by PALLES, C.B., cannot be supported. And indeed the Crown did not seek to support it in the present case. To value the shares on the basis that the restrictions contained in the articles were to be ignored would be to value a property which the deceased never owned and which did not pass on his death. But it seems to me that the same reasoning is fatal to the conclusion reached by the majority in the Court of Appeal. Under the article it is not possible to sell the shares in the open market until they have been offered to and refused by the existing shareholders. In order, therefore, to comply with sect. 7 (5) of the Finance Act, it is necessary either to assume a sale in the open market of the shares, or else to limit the property to be valued to that which could be sold in the open market. The latter is the alternative which the Court of Appeal have preferred. Since the articles forbid a sale in the open market until the rights of pre-emption have been exhausted, all that the executors could sell in the open market at the time of the death was the right to receive the restricted price fixed by art. 34 (14*a*) from any shareholder exercising his right or pre-emption. Obviously the value of this could not exceed the sum which such a shareholder would have to pay, and accordingly the Court of Appeal have held that that sum, i.e., the restricted price, is the value in the open market.

My Lords, it seems to me that this construction involves treating the provisicns of sect. 7 (5) as if their true effect were to make the existence of an open market a condition of liability instead of merely to prescribe the open market price as the measure of value. The right to receive the price fixed by the articles in the event of a sale to existing shareholders under sub-clause (14*a*) is only one of the elements which went to make up the value of the shares. In addition to that right, the ownership of the share gave a number of other valuable rights to the holder, including the right to receive the dividends which the company was declaring, the right to transmit the share in accordance with art. 34 (1), (2) and (3), and the right to have the shares of other holders who wished to realise offered on the terms of art. 34 (14*a*). All these various rights and privileges go to make up a share and form ingredients in its value. They are just as much part of the share as the restriction upon the sale. The construction placed upon the statute by the Court of Appeal seems to me to ignore all these elements in the value of the share and to treat as its value what, in truth, is only the value of one of the factors which go to make up that share. But the purpose of sect. 7 (5) is not to define the property in respect of which estate duty is to be levied, but merely to afford a method of ascertaining its value. If the view entertained by the Court of Appeal were correct, it would follow that any property which could not be sold in the open market would escape estate duty altogether. That seems to me quite an unnecessary and unnatural construction to place upon the language of the statute. In the words of Lord Buckmaster (*Poplar Assessment Committee* v. *Roberts* (5)) at page 103:

> so to interpret the statute would be to deal with something which was nothing but a measure of value in such a manner as completely to destroy the very object for which that measure was set up.

On the other hand, I can see no difficulty in treating the subsection as meaning that the Inland Revenue Commissioners are to assume that the property which is to be valued is being sold in the open market and to fix its value for estate duty purposes upon that hypothesis. A somewhat similar problem is familiar in rating cases. There the legislature has fixed the rateable value as the rack rent on a yearly tenancy. It has long since been established that the fact that the premises cannot actually be let on a yearly tenancy does not exempt them from liability for rates. Indeed in those cases, in order to arrive at the rateable value the courts have had to embark upon speculations far more difficult and artificial than any involved in the present case. I think that full justice is done to the meaning of the subsection if the property to be valued is determined by the earlier sections and sect. 7 is treated as being merely a statutory direction as to the method by which the value is to be ascertained. In

order to comply with that statutory direction, it is necessary to make the assumptions which the statute directs. This is not to ignore the limitations attached to the share. In the present case a share in such a company as this, with an unrestricted right of transfer, would probably be worth at least twice as much as the £355, which is fixed by FINLAY, J. On the other hand, the effect of the construction which I am putting upon the section seems to me to be the only one which does enable the provisions of sects. 1 and 2 of the statute to be carried into effect and which ensures that the property in respect of which estate duty is levied shall include all that property which passes on the death of the deceased, and not merely such part of that property as could be disposed of in open market. For these reasons, I think the decision of the majority of the Court of Appeal was wrong, and that the cases of *Jameson* (1) and *Salvesen* (2) were rightly decided. This is sufficient to dispose of the principal point in the case.

There is, however, a subsidary point upon which I must now say a few words. Before the learned judge at the hearing of the petitions, evidence was given on each side as to the value which ought to be placed upon the shares upon various hypotheses. The evidence which the learned judge seems to have accepted was that of Lord Plender, who was called on behalf of the petitioners; upon the basis of his figures, the learned judge fixed the value, on the hypothesis which I have held to be the correct one, at £351 in the *Crossman* case and £355 in the other. In fixing those figures, it appears from the judgment that Lord Plender "did not exclude anybody or include anybody in particular; he considered the matter generally." In my opinion that is the right way in which to arrive at the value in the open market. But the learned judge goes on to say that evidence was called for the Crown which indicated that a particular trust company would be willing to give a good deal more than the ordinary market price, because of certain particular attractions which the prospect of getting upon the share register would hold out for such a company. The learned judge says that he excluded trust companies from the possible buyers because he had evidence to satisfy him that the directors would not have consented to put them upon the register. I cannot think that this is a proper reason in the view which I have taken as to the construction to be put upon the subsection of the Act. On the other hand, I think it is a fair construction to put upon the learned judge's judgment that the extra sum which could be obtained from trust companies was not an element of the value in the open market, but rather a particular price beyond the ordinary market price which a trust company would give for special reasons of its own. I do not think that it would be right to appreciate the value of the shares because of this special demand for a special purpose from a particular buyer.

I accept the principle upon which Lord Plender gave his evidence as the correct one to apply, and I think, therefore, that the figure which the learned judge reached of £351 and £355 respectively is the correct measure of value. It follows that in my opinion the judgment of the learned judge ought to be restored, the order of the Court of Appeal should be discharged, except in so far as it dismisses the cross-appeal of the Crown with costs, and that the cost of the appeal to the Court of Appeal and to your Lordships' House should be paid by the petitioners.

Lord Blanesburgh: My Lords, the company of Mann, Crossman & Paulin, Limited, with some of the ordinary shares in which your Lordships are, on a question of estate duty, here concerned, was incorporated as a public company in 1901 to take over and carry on an old family business of brewers. Its paid up capital of £2,250,000 is divided into 125,000 5 per cent. preference shares of £10 each, and 10,000 ordinary shares of £100 each. The preference shares are quoted on the London Stock Exchange. The regulations of the company with reference to these shares have not been printed in the record, but doubtless they enjoy an unfettered privilege of transfer and transmission incident to shares so favoured. The ordinary shares, of course, are not quoted. Art. 34, with which we have become so familiar, effectually prevents anything of that kind. The difficulty of the case, indeed, is traceable to the fact that the effect of that article, coupled with the company's exceeding prosperity, makes it practically certain that just as there has never been, so for many a day there will never be any of these ordinary shares available for any actual sale or transfer to any outsider anywhere. Not that the price that would be offered for the shares in the open market if any were there available is impossible of estimate. The fact that the preference shares are quoted is, of course, helpful. The position of the company is well known in consequence. And the prices there obtainable for ordinary shares at the relevant dates have been here ascertained by Finlay, J. The only question is whether the inquiry to which the learned judge then found the answer was one authorised by the provisions of the statute.

The terms of art. 34 are in detail before your Lordships. The article is of a type, as will have been seen, more frequently discovered in the regulations of a private company than in those of a public company like this. In a business sense, no doubt, the ordinary shareholders here, and not for the first time, have, as a result of the article, become in effect a controlling private association within the frame of a public company. But in the sphere of company law—it is convenient to say so—the ordinary shares remain shares in a public company in no way distinguishable juridically from its preference shares.

I have thought it helpful to the solution of the problem before the

House that, if only for the purpose of illustration and contrast, the capitalisation of the company and the existence of its preference shares publicly quoted should be pointedly brought to your Lordships' notice.

To no more than two characteristics of art. 34 need I specially refer now. The first, somewhat unusual, is that the article discriminates between the male and the female holders of ordinary shares. The privileges by way of transfer and transmission to favoured transferees and appointees extended to male holders by sub-clauses 1, 2 and 3, are withheld from female holders of shares. The latter are with the male holders entitled to participate in the pre-emption privilege under sub-clause 13, but they can only dispose of their own shares under sub-clause 6 : while their executors after death must do so under sub-clause 14.

This first characteristic of the article is perhaps now curious only : the second is important. The article, the pre-emption clause particularly, although that clause, as is now on all hands accepted, is tainted with no illegality and is binding both upon the ordinary shareholders and the company, is not fundamental in the sense that provisions of the memorandum of association or some provisions with reference to shares contained in the Companies Act are fundamental. This has been appositely pointed out by PALLES, C.B., in his judgment in *Jameson's* case (1). The article is and remains binding only by agreement. It may at any time, by special resolution, as indeed is in terms provided by sub-sect. 16, be altered in any and every particular. An unalienable characteristic of the regulations of the article, all important, as will be seen presently, when its relation to the Finance Act comes to be considered, is that they are maintained and can at any time be abrogated by the agreement of not necessarily more than three-fourths in interest of the holders of the ordinary shares affected.

We are concerned here with the proper charge for estate duty on 2,600 of these ordinary shares, 1,000 or the bulk of them passing, by bequest, to the respondent, Douglas Crossman, on the death of his father, Mr. Percy Crossman : and 1,600 passing on the death of Sir William Paulin. With reference to Mr. Crossman's shares, it is necessary only to say that they have been duly registered in the name of the respondent, Mr. Douglas Crossman, who is also one of his father's executors. In what follows I will for convenience of statement direct attention mainly to the ordinary shares passing on the death of Sir William Paulin, the questions of principle at issue being identical in the two cases.

Five hundred of those shares were bequeathed by the deceased to each of his two daughters. The shares, like those bequeathed by Mr. Crossman to his son, have been registered in their respective names. The remaining 600 shares have been duly registered in the names of ordinary shareholders in the company, to whom under art. 34 (13),

the pre-emptive clause, they had to be offered within three months of Sir William's death and by whom they have been acquired at a price which must be taken to have been not less than £146 a share below their "principal value" as ascertained by Finlay, J. This figure may be taken to represent the value of the pre-emption rights and suggests considerations to which attention will later be directed. The 1,000 shares—so destined by the deceased that their transit was not impeded by any restriction in art. 34—have passed directly to the daughters, just as preference shares of the company would have passed under the regulations applicable to them had preference shares, in place of ordinary shares, been the subject of the specific bequest. And had that been the case, the method to be adopted for ascertaining the "principal value" of these preference shares would not have been open to controversy. It being an accepted fact that the entire legal and beneficial interest in these shares had, under the Finance Act, 1894, s. 1, passed on the death of the deceased, their "principal value," ascertained by the commissioners under sect. 7 (5), would have been taken to be the quotation for the shares current on the day of the death—a sufficient and perhaps the best criterion of the price which, had he been given the opportunity, a purchaser in the open market would have offered for the registration of the shares in his own name as successor to the deceased.

And this at once suggests the question whether in this matter of estate duty there is any essential difference between a preference share with its public quotation and an ordinary share with none. Why, although not saleable in the open market, should not shares passing on death be valued as if they were? Is there more in it than this, that the proof of market value when in neither case are any shares of the deceased actually sold, is more difficult in one case than in the other? The commissioners' question in each case is in effect the same. That for the preference shares has already been indicated: for ordinary shares in substance it would be "assuming the deceased's shares to be saleable in the open market at his death, what price would they fetch?" The commissioners here have answered with a figure of £475 a share, and Finlay, J., on appeal with a figure of £355, an answer which, subject to a qualification not in this connection relevant, has been accepted on all hands as reliable. Is there any valid reason why it should not be accepted as the "principal value" of these shares? I have been unable to find one. And there are cogent reasons in its favour. It is almost a case of *stet decisis*. The figure embodies what Finlay, J., calls the *Jameson* principle, now 30 years old, approved since in Scotland and in the Irish Free State, nowhere questioned, and acted upon by the Revenue Authorities all along, their invariable practice having been to treat the sum analogous to Finlay, J.'s, £355 as the "principal value" of such a share as are the ordinary shares in this case.

Now, however, the Court of Appeal in England, declining to follow the *Jameson* case (1), has held that the "principal value" of each of Sir William Paulin's 1,600 ordinary shares is for the purposes of estate duty not £355, but £209 13*s.* 8*d.* only—their pre-emption price already referred to.

My Lords, it can, I believe, be shown that this sum of £209 for each share thus arrived at, so far from being its "principal value," is by the Finance Act itself denied that description. But as the *Jameson* principle is in my judgment sound, and as FINLAY, J.'s, £355 ought not, I think, to have been displaced, it may be most convenient that, reserving that point, I should trace and where necessary seek to justify the course, which led to that valuation. There will as a result be clearly disclosed the point at which and the justification or want of it with which the Court of Appeal separates itself from a principle and subsequent practice so well authenticated, so uniform and so thoroughly established.

But may I by way of introduction say one or two things, general in character? The question at issue between the Crown and the respondents should be recalled. It has been happily stated by ROMER, L.J., as follows:

> Are the shares to be valued (under sect. 7 (5) of the Act) on the footing that a purchaser would in spite of the articles of association be forthwith entitled to be put upon the company's register in respect of them or are they to be valued upon the footing that the purchaser would only obtain such right in respect of the shares as Sir William Paulin could at the time of his death have conferred upon him consistently with these articles?

The first of the Lord Justice's alternatives embodies the *Jameson* principle, applied by FINLAY, J. The second is that finally adopted by SLESSER, L.J., and himself, and I would at once emphasise with regard to it the fact that the value so arrived at was in the Lord Justice's view the "principal value" of the only property in the shares which passed on the death of the deceased—the duty, as he explained at the commencement of his judgment, being chargeable only under sect. 1 of the Act. The seriousness of the difference in this respect between the two alternatives will emerge as we proceed.

I would next observe that the working of the Finance Act, s. 7 (5), in some respects at least, is now well ascertained. Some principles governing its application generally are either accepted or are, as I think, easily justified. If these are borne in mind in this case, the issue of the appeal, otherwise confused and involved, becomes, as I venture to think, relatively clear if not indeed inevitable.

Here are some of the fundamentals on which the working of sect. 7 (5) must now, in my judgment, be taken to proceed. (1) The "property," the "principal value" of which is thereunder to be estimated by the commissioners, is the *whole* property brought into charge by the Act,

and not a part of it only. (2) That "property" may include many items over which the deceased had no power of disposition while he lived and over which his executor has none after his death. (3) If the duty of the commissioners is, as I think, to estimate the price the "property" as at the time of the deceased's death would fetch in the open market, if it were there to be offered for sale, it is unnecessary to enquire by whom the property would hypothetically have to be offered. It must not, however, be assumed that even the property passing under sect. 1 whose price in the market is to be estimated by the commissioners is necessarily or even relevantly confined to property at the disposition there either of the deceased or his executor. A consideration of the circumstances surrounding the notional sale under the section of the *corpus* of settled property passing on death under sect. 1, displaces of itself any such assumption. In that case the deceased normally never had in the *corpus* of the property any interest at all, while his interest in the income had ceased with his death. In other words, any finding which would confine property passing under sect. 1 of the Act to property of which the deceased or his executor could dispose in the open market must be otherwise justified, if it is to be accepted. Is that limitation of the Court of Appeal justified in the present case? That is the question the respondents have to face.

(4) Except in cases within sect. 3 of the Finance Act it is quite immaterial to whom the property has actually passed, whether to purchasers, legatees, or in the case of pre-empted shares, other members of the company issuing them. The question for the commissioners is not to whom has the property passed. The question is whether it has passed at all. If it has passed, then subject only to a case covered by sect. 3, no existing contract with reference to the property, although it be binding on the deceased's estate, has any influence upon the commissioners' estimate of the price which in the open market it would fetch. In this connection sect. 3 of the Act, quite neglected by the Court of Appeal, and with its importance so far emphasised only by Palles, C.B., will be found to be illuminating. For the moment, however, I pass it by; observing, as I conclude this general survey, how it seems to indicate that the solution of the difficulty between the Crown and the respondents here will ultimately turn upon the answer to two questions: (1) What was the property in his ordinary shares which passed upon the death of each deceased? And (2) What influence, if any, does the pre-emption clause in art. 34 exercise over the parcels to be included in the notional sale of the property envisaged by sect. 7 (5) of the Act?

Proceeding now to deal with the case presented by the Crown, my answer to the first question is that the property which so passed here was the deceased's entire legal and equitable interest in his ordinary

shares ; each share a separate entity—a " property " within the meaning of the Act charged to duty as it passed

in the ordinary sense of the term from the deceased into the possession and property of another person after his death :

see per LORD WATSON in *A.-G.* v. *Beech* (6) at page 58. And I desire to emphasise the fact that the property which so passed was an entire " indivisible piece of property," as FITZGIBBON, L.J., described it to be in *Jameson's* case (1). *Borland's Trustee* v. *Steel Brothers* (4) outstanding decision that it is in its proper sphere, had as its purpose an analysis of the nature and effect of the different rights and incidents attached to a share, so as to enable a decision to be taken as to their legality in instances in which legality was questioned. But the judgment does not suggest that a share in a joint stock company may not properly be described in the words of FITZGIBBON, L.J., or by others to the like effect. A tribunal would be rash indeed to deny that description to things which pass as such by transfer in myriads, I suppose, every month if not every week, and pass only less frequently by transmission, surrender, or on forfeiture. As such a piece of property a share may be the subject of lien, and in the case of the *Bradford Banking Company* v. *Briggs* (7), the shares over which the lien, there extended, were not once only referred to by LORD BLACKBURN as " property." Again, in the *Colonial Bank* v. *Whinney* (8), where shares in a railway company were held to be included in the expression " choses in action " in the proviso to the order and disposition section of the Bankruptcy Act, LORD BLACKBURN in his judgment, speaking of the shares in question in that very case, said that they were also personal chattels the property in which did not pass by mere delivery, but did pass by a deed of transfer duly stamped. I can myself feel no doubt that it is in this sense, and in this sense only, that shares in joint stock companies are " property " within the meaning of the Finance Act, 1894, charged to duty under sec. 1 as therein stated.

To all the shares here in question I would apply the words already referred to used by FITZGIBBON, L.J., in *Jameson's* case (1) :

Each of the 750 shares there in question,

with all rights and liabilities and all advantages and disadvantages included in its ownership passed on Henry Jameson's death to his executors as one indivisible piece of property. In conveyancing phraseology the executors took such shares to hold in as full and ample a manner as the same were held by Henry Jameson at his death.

And later the Lord Justice adds :

The basis of my construction of the act is the unity and indivisibility of Henry Jameson's property in the shares. I cannot accept any procedure or accept any solution of the question in dispute which splits up that interest for any purpose.

And at this point, my Lords, and for two reasons, I venture to insist upon the soundness of the above views of the Lord Justice as applied to the shares in the present case.

First, it is, I think, of quite major importance to the whole commercial community that these views should be upheld. The troubles which would follow any departure from them were well illustrated by Mr. Radcliffe's argument on behalf of the respondents. Applied to the ordinary shares of this company the analytical method advocated by counsel would attribute one quality and character to the shares held by women, and another to the shares held by men. And in varying degrees, no one share of an issue would be like another. The truth indeed is that *Borland's* case (4)—most apposite in, for instance, *Jameson's* case (1) in the Divisional Court where the legality of the restrictions on the shares was the main question at issue, ceases to be important—I had almost said that it ceases to be relevant—in a case like this where the complete legality of art. 34 is in every particular fully recognised. And my second reason is like unto the first. I venture to insist upon the view of the Lord Justice in order that with its support I may meet in advance a view presented by Palles, C.B., in his judgment in *Jameson* (1), one which, although not accepted by the Irish Court of Appeal then, nor alluded to by either Sleser, L.J., or Romer, L.J., now, was, at least partially, revived at your Lordships' Bar by learned counsel for the respondents. The view, as expressed by the Chief Baron, was that while the whole legal and beneficial interest in each of such shares as are now in question has passed on the death of the deceased, it has so passed in what may be called two parts: (1) the share subject to the right of pre-emption—" property " within sect. 1 of the Act; and (2) the right of pre-emption itself " property," that is, under sect. 2 (*b*), in which the deceased had an interest ceasing on his death " in respect of which a benefit accrued or arose by the cesser of such interest," and which was therefore " deemed to pass." It was, on this point alone, that FitzGibbon, L.J., differed from the Chief Baron, and upon it for the reasons I have given I find myself entirely at one with the Lord Justice.

Later I must refer to this matter again. But if passing it by for the moment, I may now assume that the entire property of the deceased in his ordinary shares did pass on his death under sect. 1 of the Act, then the ascertainment of the " principal value " of these shares becomes, on the *Jameson* principle, simple and entirely consistent with the scheme of the Act in this regard.

First, as would be in the case of the quoted preference shares of the company, it is the price in the open market obtainable for the shares as at the date of the death which has to be estimated, the shares each as an entire thing which have passed to their present registered holders in succession to the deceased. And, next, if the commissioners' notional

sale is to be a sale of the entire share just as it belonged to the deceased immediately before his death, then registration of the share in the name of the notional purchaser must also be offered. ROMER, L.J., concedes this fully. With reference to the property to be valued, "it is obvious," he says, "that the commissioners must assume that the property can be transferred to the hypothetical purchaser."

The same conclusion is thus put by the Chief Baron in *Jameson's* case (1). The hypothetical sale and purchase, he says, at page 683,

> must be a sale of the property which the deceased had in the shares at the time of his death—that is, of the entire legal and beneficial interest therein of that interest by virtue of which the deceased had been and had been entitled to be a member of the company in respect of such shares: a sale by virtue of which the purchaser thereat would have been entitled to have had that which he had bought vested in him in the same manner as it had been vested in the deceased and consequently under which he would be entitled to be registered as a member in respect of the shares,

and later (page 689), after saying that the supposed sale is being made in the open market on the assumption that the open market is available, the Chief Baron proceeds:

> And upon this assumption which is the supposition the statute directs us to make we must exclude the consideration of such provisions in the articles of association as would prevent a purchaser at the sale from becoming a member of the company registered as such in respect of the shares purchased by him at such supposed sale. If we do not, we do not give effect to the assumption the statute coerces us to make.

That is to say, the preventive provisions of the article are to be ignored, whether they provide for the other shareholders' rights of pre-emption or for the approval by the directors of every transfer.

Had this principle been remembered or accepted at the hearing of this case, the difficulty created by the directors' proved objection to a trust company as shareholder could never have arisen. It would have been seen at once to be quite irrelevant to the question before the court. But the pre-emption rights definitely withdrawn from interference by that general principle are—a most important aspect of the case—separately ruled out by sect. 3 of the statute, to which now attention must again be directed.

Once more I return to the judgment of PALLES, C.B., in *Jameson's* case (1), at page 682, for a lucid statement of the position, so regarded:

> The substance of the argument for the defendant was that the executors were on the death of the deceased under an enforceable obligation to sell the shares at £100 each [here at £209 each] and that this obligation ascertained and fixed their assessment value for the purposes of the Finance Act. During the argument I asked Mr. Ronan whether he contended that the provisions in the articles amounted to or contained a *bona fide* contract of purchase of the shares from the deceased for full consideration in money or money's worth paid to him for his own use or benefit within the Finance Act, s. 3, or that the case was otherwise within that

section. He replied that he did not. And consequently I leave this section out of consideration altogether.

Now, it is plain that, with reference to the pre-emption rights here—at £209 13*s.* 8*d.* for each share—no other answer could be given. It is stated, indeed by Romer, L.J., in his judgment, that each of these shares in the name of either of Sir William Paulin's daughters was worth £355. The result, therefore, is that it not being possible to rely on sect. 3, the existence of the pre-emption right here must be ignored so far as the *parcels* of the commissioners' notional sale are concerned.

May I elucidate the position as I see it by an illustration, so drawn as to have regard to the regulations in this respect governing the ordinary and preference shares of the company respectively. Let it be supposed that a deceased person had in his lifetime purchased two valuable jewels from a dealer in Hatton Garden : one a diamond brooch ; the other, shall we say, a string of pearls, the pearls an out and out purchase, but the brooch on the terms that if the deceased retained the jewel at his death and died without making it the subject of a specific bequest, the dealer was to have the right to purchase it from his legal personal representative for, shall we say, £1,000. The deceased died intestate, retaining both jewels. At his death the price obtainable for the brooch in the open market was £3,000. And this, too, was the value of the pearls. The dealer claimed the brooch as he was entitled to do at £1,000, and it was handed over to him on payment of that price. In these circumstances, what was the " principal value " of the brooch ? Like the value of the pearls, it was, I suggest, undoubtedly £3,000, and for the reason that the dealer's pre-emption price was not one protected by sect. 3 of the Act. So far, the analogy between the brooch and the ordinary shares here is complete, just as is that between the pearls and preference shares in the company. But there, so far as concerns the ordinary shares and the brooch, the analogy ends. The pre-emption right over the brooch never comes within the purview of the commissioners at all. The right does not burden the brooch in the hands of its notional purchaser. But to the ordinary shares in the purchaser's hands the pre-emption rights still attach, and must be duly discounted by the commissioners in their estimate of the price the shares will fetch.

And, my Lords, it is at this point, more perhaps than at any other, that I find myself in accord with the *Jameson* principle and in fundamental difference with the views of the majority of the Court of Appeal. The Lords Justices have forgotten sect. 3 of the Act, the application of which to the pre-emption clause, reduced in consequence to a mere agreement, is, I hope, made clearer by the illustration just offered.

The resulting misapprehension appears most clearly in the judgment of Kenny, J., in *Jameson's* case (1), which is approved by Romer, L.J.

The learned judge actually assumes that a right of pre-emption with the price payable thereunder will of itself prevail against a sect. 7 (5) valuation. He says, at page 671 :

> There is nothing to prevent a man from agreeing to a purchase of property and giving a right of pre-emption as part of his contract.

That is so, and nothing in the Finance Act will interfere with the full exercise of the right. The Act has not in the present case interfered with the exercise of the pre-emption rights over 600 of Sir William Paulin's ordinary shares. But unless the pre-emption price is a full price under sect. 3, the right of pre-emption will not be operative to withdraw the property from the operation of sect. 7 (5) of the Act. And, my Lords, it was by the application of the *Jameson* principle as just traced to the facts of the case that FINLAY, J.'s, price of £355 for each ordinary share of the deceased was reached. And that principle and its application here I have in this judgment sought to justify.

I have done so largely, as will have been seen by quotations, too copious, perhaps, from the judgment of the Chief Baron in *Jameson's* case (1). I have made these quotations copious in order that they might appeal to your Lordships by their own inherent strength. The whole judgment of the Chief Baron I have found to be a masterly presentment of the *Jameson* principle, a judgment which must always have been regarded as the most vital of any delivered in the case had it not been consistently discounted by what I cannot help thinking has been a serious misapprehension as to the conclusions actually reached by the Chief Baron. The Chief Baron's real conclusion is expressed in the terms of the declaration with which he prefaces his judgment. That declaration it will be found is followed almost textually by the Court of Appeal, the concluding words of their declaration " and should take and hold them subject to the provisions of the articles of association including the articles relating to alienation and transfer of the shares of the company " being added not because of any difference with the Chief Baron, but because the Attorney-General, abandoning his previous contention, admitted in the Court of Appeal (see per HOLMES, L.J.) without reserve the legality of the articles and their binding effect upon the company and all its members.

In the Court below, the Chief Baron, instead of ignoring, as has been supposed, the restrictive regulations, attributed to them full force as an agreement, which as above shown they were, and not because they were fundamental provisions like those required by statute, which they were not. As to *Borland* (4), he did not then, it is true, accept the decision of FARWELL, J., as to the legality of the regulations. Upon them he reserved his final opinion. But for the purposes of his judgment he could and did assume the regulations to be valid. The suggestion

which appears in the judgment of Slesser, L.J., that he treated the shares in the hands of the notional purchaser as being free from any of the conditions governing the other shares of the company, I believe to be completely mistaken. If this judgment has no other result, it will, at least, I hope, direct the attention of the profession to a pronouncement which, although with one part of it I do not agree, ought justly to have its proper place amongst the notable deliverances of a very great judge.

I turn now to the judgment of the Lords Justices and the views enunciated by them. My answer to these will really be found in what has preceded. The process of reasoning by which Slesser and Romer, L.JJ., reached their conclusion is made specially clear in the judgment of Romer, L.J., who deals in detail with each aspect of the problem. First of all, as I have already noted, the case was in his judgment a sect. 1 case. Upon Sir William Paulin's death his ordinary shares, the Lord Justice says, passed "within the meaning of the Finance Act, 1894, s. 1." And what so passed under the designation of a share which had to be valued for the purposes of estate duty, the Lord Justice describes, "nothing more than the totality of [the deceased's] rights and liabilities as they exist under the provisions of the Companies Act and the constitution of the . . . company." There was nothing in sect. 7 (5) of the Act to suggest to his mind even remotely "that what is to be treated as being sold is something other than the property which passed upon the death." And this next statement of his reduces most usefully the limits of the controversy:

> If a share in Mann, Crossman & Paulin, Limited, is regarded merely as a right to get placed on the register of members with the rights and subject to the liabilities that would result from such regulations, the principal value of such share must of course be ascertained upon the footing that the right can be conferred upon a purchaser in the open market. If, on the other hand, as I think is the case, the inability to confer upon such a purchaser a right of registration is a part of the essence of a share, the value must be ascertained with a due recognition of that fact.

My Lords, these statements show how narrow are the limits of the controversy. For no one suggests, I think, that there can, under the Act, be any valuation or estimate of the price of any property which has neither passed nor been deemed to pass thereunder. On the other hand, the Lord Justice agrees that if the view of the Crown is correct as to the extent of the property in the shares which passed here, then the *Jameson* principle is rightly applicable to the very end. The Lord Justice, in short, makes it clear that the real controversy is over the question, what was the "property" which under the Act passed when on Sir William Paulin's death his ordinary shares passed to his daughters and the pre-empting shareholders? Was there anything more left for the commissioners to do in reference to these shares than to estimate

the highest price which in the open market would be offered for the privilege of being registered as their holders ? That is the view of the Crown. It is perhaps only by stating the question in that objective form that the strength of its position and the essential simplicity of its case is realised.

On the other hand, the opposite views of the Lords Justices above set forth are, I think, correctly interpreted by the respondents in the third reason of their printed case, where they describe the price in the open market to be estimated by the commissioners under sect. 7 (5) as being

> the price of ordinary shares in the company offered upon terms that a transfer notice giving the holders of the remaining ordinary shares a right of pre-emption at the prescribed price was to be duly served in accordance with art. 34, and that the hypothetical purchaser in the open market was to have the right to become the registered holder of the shares sold to him in the event of such right of pre-emption not being exercised or receive the prescribed price payable for such shares under art. 34 by the member or members purchasing the same.

I do not know, my Lords, why, on the principle there invoked, the pre-emption rights should have been so carefully safeguarded and the directors' veto on any transfer should have been so completely ignored. It may have been felt that with that veto also interposed there would not be left for offer in the open market even the " restricted and fettered thing " described by KENNY, J. To me the omission is eloquent as illustrating the length to which the respondents are necessarily driven by this process of analysis to which for the purpose of its valuation they subject a share which passes under the Finance Act. If it was a share which passed, it was certainly not a share as the Attorney-General strongly insisted it should be, which was being valued or notionally sold.

The positive objections to which as I think the views of the Lords Justices are open I can, in view of what has been already said, state summarily : (1) Their order does not treat each share as a single entity, which for reasons already given I believe to be essential ; also with, as I think, no justification, it makes the power of the deceased or his executors to dispose of a share in the open market the test of the extent of the property in it which passes under the Act. (2) Dividing the shares, it would seem, as PALLES, C.B., divided them, an operation without justification, the Lords Justices have no regard to the second interest, indicated by the Chief Baron, viz. : the value of the pre-emption right " deemed to pass," but have regard only to the first which " passed " under sect. 1 of the Act. Upon the principle adopted by them over one-third of the ascertained " principal value " of each ordinary share escapes duty. (3) the order fails to recognise that while the pre-emption clause of art. 34 is valid and binding upon every holder of ordinary

shares, it is in view of the Finance Act, 1894, s. 3, ineffective to prevent a notional offer of the shares for sale in the open market although effective to reduce the price they will fetch there. In truth, the result of the order of the Court of Appeal is to give to the respondents the benefit of sect. 3 of the Act in a case to which that section has no application.

My Lords, learned counsel for the respondents, seeking for safety perhaps, raised at your Lordships' Bar for the first time the contention that in this case the duty was not chargeable under sect. 1 of the Act, but in large measure, if not altogether, under sect. 2, and that for no duty beyond that on the pre-emption price were the executors, as such, chargeable. The order of the Court of Appeal, therefore, on that ground alone should be affirmed, for that it was only as an executor that any respondent had been sued. The answer I would make to that contention is, and for the reasons I have given. that the whole duty on the £355 a share is chargeable under sect. 1. But if on the Chief Baron's view any part of it had to be borne under sect. 8 (2), then it was, I think, too late for the executors to raise that objection for the first time at your Lordships' Bar. The case from the outset is concerned with the amount payable in respect of estate duty and not as to its ultimate incidence. I have no doubt that throughout the proceedings the executors allowed themselves to be treated as liable for any estate duty chargeable in respect of these shares.

I agree with, I believe, all your Lordships in thinking that any possible bid for the shares by a trust company was allowed for by Lord Plender in his estimate of £355 a share accepted by the learned judge as reliable. Had that not been so, the Crown's contention on this point would have been, I think, unanswered. But with that fact in view, it fails.

My Lords, on the whole case I am in complete agreement with the motion just made by the Lord Chancellor.

Lord Russell of Killowen [read by Lord Macmillan]: My Lords, the question at issue in these cases is how, under the provisions of the Finance Act, 1894, are the ordinary shares in a company called Mann, Crossman & Paulin, Ltd., to be valued. It is not a question of ascertaining their actual value, or their true value, or their intrinsic value, or their value in some particular person's ownership. The value to be ascertained is their statutory value. I emphasise this at the outset, because the only tax imposed by the Finance Act, 1894, s. 1, is to quote the words of the Act, "upon the principal value ascertained as hereinafter provided" of property passing on death.

The relevant section for the purpose of ascertaining the value of such property is sect. 7; and in particular, subsect. 5 thereof. The matter resolves itself, therefore, into the true construction of that subsection. Before referring to its terms, let me mention briefly the relevant facts as they relate to the shares owned by the testator, Sir William

Paulin. It is conceded that the same principles apply to the case of both testators, and that a decision in one case will govern the other.

The company's articles contain special provisions as to ordinary shares, the effect of which (so far as they apply to Sir William Paulin's shares) I can state briefly, but I hope accurately, thus: A male holder can transfer *inter vivos* to persons falling within a defined class and being in other respects in the opinion of the directors duly qualified for membership. A male holder can by testamentary disposition appoint to any of the same class, and such appointee will be entitled to a transfer of the shares from the legal personal representatives of the appointor, if within three months of his death the directors signify approval of the transferee. Except where a transfer is made pursuant to the above powers (and certain other immaterial cases) a member proposing to transfer shares can only do so after a period of three months, and then only if no member has been willing to purchase them at *par* plus certain additions defined by the articles. During the three months the other members have the overriding right of pre-emption at this fixed price. It is only if and to the extent to which this right is not exercised that the proposing transferor can sell and transfer shares to any person and at any price. The shares of a deceased member which have not been appointed by his will under the powers indicated above are similarly subject to an overriding right and pre-emption in the other members at the fixed price; and it is only if and to the extent to which this right is not exercised that the member's legal personal representatives can sell and transfer the shares to any person and at any price. Finally, the directors may refuse to register any transfer of a share (amongst other cases) where they are of opinion that the proposed transferee is not a desirable person to admit to membership and that without being bound to assign any reason for such opinion; but this power does not apply where the proposed transferee is already a member holding more than 250 ordinary shares.

Sir William Paulin was the owner and registered holder of 1,600 fully paid ordinary shares of £100 each in the company. By his will he appointed 500 of these shares to each of his two daughters, leaving the remaining 600 shares to become subject to a residuary trust for sale. He died on Feb. 26, 1931. Thereupon the 1,600 ordinary shares passed to the executors appointed by his will, and in order to "ascertain as hereinafter provided" the principal value of all property which so passed, recourse must be had to the Finance Act, 1894, s. 7. By subsect. 5 of that section it is provided that the principal value of any property shall be estimated to be the price which in the opinion of the commissioners such property would fetch if sold in the open market at the time of the death of the deceased. The crucial question in this appeal is what price would these 1,600 shares fetch in the circumstances specified?

There can, I think, be no doubt, and indeed it was conceded, that in estimating the value of Sir William Paulin's shares in accordance with this provision, no difference can be drawn between the 1,000 shares appointed to his daughters and the 600 shares which form part of his residuary estate. The yard-stick is the same for each; the shares are imagined to be the subject matter of a sale in the open market at the time of the death of Sir William Paulin, and an opinion must be formed as to the price which they would fetch. The whole process is hypothetical, but the parcels to be hypothetically sold are the shares. Further, since the hypothetical sale takes place at the time of the death, the hypothetical vendor must be either the dying shareholder or his legal personal representative. Probably the former, so as to meet the case where no legal personal representative exists. But for the purposes of this case it matters not which, because both in the case of the dying shareholder and of his legal personal representative the subject matter of the sale would be shares over which under the articles of association the other members of the company had an overriding right of pre-emption.

It is the existence of this right of pre-emption which is the foundation of the dispute between the parties, the appellants contending that it must be disregarded in estimating the price under sect. 7 (5), the respondents contending that it cannot be disregarded and that its existence in the circumstances of the present case controls and limits the price which the shares would fetch in the open market.

A similar dispute has been the subject of decision in the Irish courts. In the case of *A.-G.* v. *Jameson* (1), it was held by a majority in the King's Bench Division in Ireland that in applying the provisions of the Finance Act, 1894, s. 7 (5), regard must be had to the special provisions in a company's articles of association with reference to alienation and transfer of the shares of the company and as to "fair value," but that the amount of the principal value was not necessarily limited to the par or fair value of the share. In that case the shares were £100 shares, and the right of pre-emption was at £100 or such other sum as should from time to time be fixed as the fair value by resolution of the company in general meeting. On appeal, the Court of Appeal held that the price should be estimated upon the footing that the purchaser would be entitled to be registered as holder of the shares, but would take and hold the shares subject to the provisions of the articles of association, including the articles relating to alienation and transfer of the shares of the company. This decision has been followed by Lord Fleming in Scotland (*Salvesen's Trustees* v. *I.R.C.* (2)).

Your Lordships have to determine which of these divergent views is the correct interpretation of sect. 7 (5). Finlay, J., as I think he was in comity bound to do, followed, in the present cases, the decision of the Court of Appeal in Ireland. On appeal from him, the Court of

Appeal here have by a majority reversed his decision, and have adopted the views and reasoning of the majority in the King's Bench Division in Ireland. Where such a conflict of judicial opinion exists, the question must obviously be no easy one to answer: but for myself I feel bound to concur in the views expressed by KENNY and BOYD, JJ., in Ireland, and by SLESSER and ROMER, L.JJ., in the present case.

A share in a limited company is a property the nature of which has been accurately expounded by FARWELL, J., in *Borland's Trustee* v. *Steel* (4). It is the interest of a person in the company, that interest being composed of rights and obligations which are defined by the Companies Act and by the memorandum and articles of association of the company. A sale of a share is a sale of the interest so defined, and the subject matter of the sale is effectively vested in the purchaser by the entry of his name in the register of members. It may be that owing to provisions in the articles of association the subject matter of the sale cannot be effectively vested in the purchaser because the directors refuse to and cannot be compelled to register the purchaser as shareholder. The purchaser could then secure the benefit of the sale by the registered shareholder becoming a trustee for him of the rights with an indemnity in respect of the obligations. In the case of the sale of such a share, the risk of a refusal to register might well be reflected in a smaller price being obtainable than would have been obtained had there been no such risk. The share was property with that risk as one of its incidents.

But a further restriction may exist, as in the present case. The articles may stipulate that a shareholder must first give existing shareholders the chance of buying his shares at a price fixed and not competitive. In such case a sale to an outsider of the shareholder's interest in the company must and can only be made subject to that obligation, which is one of the incidents which attach to and are part of the subject matter of the sale; and the sale to the outsider must necessarily include as an incident of the subject matter of the sale, the right to receive the fixed price if the right of pre-emption is exercised by the other shareholders. The consequence is that by reason of the nature and incidents of the subject matter of the sale, neither Sir William Paulin nor his executors, at the time of the death, could have sold these shares in the open market to anyone otherwise than subject to the right of pre-emption at the fixed price. The result of the existence of this right of pre-emption must inevitably be that no one at an actual sale in the open market would be prepared to offer more than the fixed price if even that.

How can any higher price be, in the commissioners' opinion, the price which the shares would fetch at the hypothetical sale envisaged by sect. 7 (5)? What justification is there for saying that the shares to be sold at the hypothetical sale are to be free from the rights of pre-emption;

that they are, in other words, to be hypothetical shares? I can find none in the language used. The subsection is perfectly general in its terms, dealing with "any property" and therefore covering all property which passes on the death; and the commissioners have to form an opinion as to the highest price which a person in the "open market" would be prepared to pay for the particular property under consideration. That I conceive is the price which "such property would fetch." But the property must surely be the property which is being valued, with all the rights and obligations which attach to it and are inherent in it. I can see no word in the subsection which justifies a different view. If the property in question is that bundle of rights and obligations known as a share in a limited company, the entirety of the bundle must surely be the subject-matter of the sale and not part only. The requirement that property be sold in the open market cannot alter the nature or character of the property which is there offered for sale. The words "open market" postulate freedom of access to the market, not freedom from restrictions attaching to the subject-matter of the sale.

I find myself in agreement with the views expressed by Kenny and Boyd, JJ., in the *Jameson* case (1) and by Slesser and Romer, L.JJ., in the present case. I can find nothing in the subsection which would justify me in holding that the vendor on the hypothetical sale is to be considered as selling something which is affected by fewer restrictions than those to which it was subject in the testator's hands. So to hold would be, as pointed out by Boyd, J., to trespass on the province of the legislature and add words to the subsection. Neither can I see any logical basis for treating the property offered at the hypothetical sale as being free from some of the restrictive features attaching to it, but remaining subject to others. Nor have I heard any satisfactory answer to the difficulty stated by Romer, L.J., when he said:

> I can find nothing in sect. 7 (5) to warrant the commissioners in estimating the value of a property passing on death by reference to the price that would be paid in the open market for property that did not so pass.

One of your lordships professes to derive some assistance, or comfort, from a decision of my own in the case of *Re Cassel* (9). I myself am not so fortunate. I have recently explained in *Christie* v. *Lord Advocate* (10) how very special that case was in its facts: and that all that I did was to indicate, as best I could, the lines upon which a valuation might fairly be reached of a benefit which (being purely personal) could not be offered for sale at all. The soundness of the decision in the *Jameson* case (1) never came under consideration in *Re Cassel* (9).

My Lords, I end as I began. The only tax imposed is on the principal value of property passing on the death, to be ascertained according to the statutory provision. It is the statutory value and no other value which has to be ascertained. Upon the facts of these cases the value,

according to the provisions of the statute, cannot exceed £209 13*s.* 8*d.* in the case of the Paulin shares, and £221 4*s.* 5*d.* in the case of the Crossman shares. I would dismiss the appeals.

In the view which I take, the question as to the exclusion of any class of possible purchasers from the open market does not arise; but I feel a difficulty in understanding how, if Lord Plender's figure is accepted, as it was by FINLAY, J., any higher figure could rightly be substituted for it. As I read the learned judge's judgment, Lord Plender in arriving at his figure had treated the market as open, and had excluded no one from it. The whole world was hypothetically there, making hypothetical bids.

LORD MACMILLAN: My Lords, in common with my noble and learned friend LORD RUSSELL OF KILLOWEN, I find myself constrained to take a different view of these cases from that which has commended itself to the majority of your Lordships. The problem is one of a type with which your Lordships are only too familiar, the problem of applying a statutory enactment to circumstances which were manifestly not in the contemplation of the legislature when it was enacted. That in the discharge of such a task differences of judicial opinion should emerge may be matter of regret, but is scarcely surprising.

I begin, however, by agreeing with all your Lordships that the shares with which these appeals are concerned are, within the meaning of the Finance Act, 1894, s. 1, property which passed on the death of the shareholders. The controversial question relates to the ascertainment of the principal value of these shares for estate duty purposes. The statute enacts that it is to be ascertained as provided in sect. 7 (5), which directs that it "shall be estimated to be the price which, in the opinion of the commissioners, such property would fetch if sold in the open market at the time of the death of the deceased."

My Lords, a share in a joint stock company is an entirely conventional creation; the congeries of rights and liabilities of which it consists is the creature of the Companies Acts and the memorandum and articles of the particular company. Within the law the rights and liabilities appurtenant to a share may vary widely. But it cannot exist independently of the inherent attributes with which it has been created. When, therefore, the legislature directs that these shares are to be conceived as being exposed for sale in the open market, in order to see what price they would fetch, I must conceive them as being offered to purchasers with all their attributes. If they are subject to conditions which restrict either the rights of employment or the rights of alienation of the holder, then the sale must be of the shares as so restricted. The Finance Act confers no power to strip the shares of any of their inherent attributes. The sale, no doubt, is a hypothetical sale, but the hypothesis is that the thing itself is being sold as it stands with all its qualities and all its

disabilities. If the analogy of the hypothetical tenant is invoked, I may pray in aid the words of Lord Buckmaster in the case of the *Port of London Authority* v. *Orsett Union Assessment Committee* (11), at page 305, where he says :

> The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament.

My Lords, in the present case, I am of opinion that neither the right of pre-emption nor any of the other conditions and restrictions inherently affecting the alienation of these shares can justifiably be left out of account when conceiving them to be exposed for sale in the open market. The purchaser of them in the open market would speedily experience their efficacy. I cannot bring myself to believe that these shares if sold in the open market would fetch a price of over £300 each, yet that is what the House is about to decide. It may be unfortunate for the revenue that the legislature has chosen a method of measuring value for estate duty purposes which may not in the present instance yield the real value of these shares. But that is not your Lordships' concern. It is not the value of the shares as they were held and enjoyed by the deceased shareholders or their value as they are now held and enjoyed by their successors that is in question. It is simply and solely on their market value that the toll of estate duty is to be levied.

For the reasons which I have thus briefly indicated and which have been more fully developed by my noble and learned friend Lord Russell of Killowen and in the opinions of Slesser and Romer, L.JJ., in the Court of Appeal my vote is for the dismissal of these appeals.

Lord Roche : My Lords, I have had the very great advantage of reading in advance the opinions prepared by the Lord Chancellor and by my noble and learned friend Lord Russell of Killowen. The case is one of manifest difficulty, but I have arrived at a definite conclusion that the appeals should be allowed for the reasons expressed by the Lord Chancellor. I think it right, however, to refer to certain additional considerations which have led me to this conclusion.

The effect of the decision of the Court of Appeal in Ireland in *Jameson's* case (1) has been sufficiently stated by others of your Lordships. The question is whether that decision was right or was wrong as the Court of Appeal (Lord Hanworth, M.R., dissenting) in the present cases decided that it was. It is to be observed that the part of the judgment of Palles, C.B., in *Jameson's* case (1) which went beyond the decision of the Court of Appeal in Ireland forms no part of the contention for the present appellants. They do not question the correctness of that part of the judgment and declaration of the Court of Appeal in Ireland which directs that in assessing the value to the notional purchaser regard is

to be had to the provisions of the articles relating to alienation and transfer of the shares. It is said, however, that having gone so far it is illogical not to go further or to start earlier and pay regard to the articles rendering transfer to a purchaser who is a member of the public impossible or unlikely at a price higher than that arrived at by virtue of art. 34 (14*a*). I am unable to agree with this contention for reasons which I will presently state. I would like first, however, to consider the results which seem to follow from the contrary view. If the price so arrived at (which for convenience I call the prescribed price) is the decisive price, then, as it seems to me, however valuable a share may be intrinsically and however wide a range of disposition may have been allowed to a shareholder by the articles of a company, and however low a price may be prescribed upon a transfer outside that range of disposition, it follows that upon the shareholder's death the shares may pass to executors and then to persons appointed by will and be to them of great value, yet the values for estate duty purposes can be no higher than the prescribed price though it be entirely inadequate, or even negligible, in amount. It is said that though this may be so it needs legislation to prevent the happening of such a result. My Lords, with all respect to those who think otherwise, in my judgment the statute of 1894 has already provided against and prevented the happening of any such result. In this respect I agree with the Court of Appeal in Ireland that the language of the Act requires in a case where no actual sale is either possible or contemplated that a sale in the open market of a notional character is to be assumed. By a sale I mean and understand a transaction which passes the property in the thing sold. It must always be borne in mind that the Finance Act, 1894, is dealing with all descriptions of property and not expressly with shares, and I regard the word "sold" in sect. 7 (5) of this Act as having the same meaning as the word "sale" in the sale of Goods Act, 1893 (see sect. 1 (3) of that Act). Shares with many other kinds of property are, of course, not within the ambit of the Sale of Goods Act; but I am of opinion that for the purposes of the Finance Act, 1894, for shares to be sold, the property in them, by which I mean the legal property, must pass. Upon an actual sale there must be an actual passing of property. Upon a notional sale there must be a notional or assumed passing of property. In so far as the passing or transfer of property is thus notional or hypothetical, no restriction upon actual passing or transfer comes into question and the article as to the prescribed price which is to rule under certain circumstances, though it is no doubt a constituent part of the bundle of rights which constitutes a share, does not, as I think, govern such a notional transfer so as to make the notional purchaser no more than a person who acquires an obligation to offer the shares to others at the prescribed price.

Two things are, however, said with regard to this matter. It is said that the statute does not require or impel to this conclusion. I am referring more particularly to the very closely reasoned judgment of Romer, L.J. The passing in the open market of the interest of the testator in the company which is described by the Lord Justice and is held by him to be sufficient to satisfy the conditions of sect. 7 (5) does not, as it seems to me, satisfy such conditions. It follows from that which I have said above as to my view of the nature of a sale and the meaning of the language of this section that I am unable to regard the transactions the Lord Justice there describes as sales within the meaning of the section. I should regard them as at most agreements for sale which, having regard to the subject-matter and the articles, would have to be of a conditional character.

It is also said that the shares to be valued are shares, which, owing to their essential nature as created or defined by the articles, are worth no more to a buyer than the prescribed price, and that they must be valued at that price. With all respect to those who hold this view, I think, with the Lord Chancellor, that a great deal more passed on the deaths of the deceased shareholders than the obligation to transfer shares at the prescribed price. For example, the right to hold them and the right to leave them to others so that they in their turn might enjoy the prosperity of the company were rights of great value, and the notional purchaser must, in my opinion, be regarded as notionally acquiring on his purchase those rights amongst the other rights connected with and going to make up the shares.

It seems to me to be important to remind oneself that sect 7 (5) of the Act is simply a provision for estimating by means of an hypothesis the value of property which has passed otherwise than by an actual sale and transfer and may be incapable of so passing. But the section has to be applied and can be applied to all such cases. As to property which by its inherent or essential nature cannot be actually sold or transferred the application of the section was explained, as I should like to explain it, by my noble and learned friend, then Russell, J., in the case of *Re Cassel* (9). The learned judge says :

> Next, how is the principal value of that property to be ascertained ? The machinery provided by the Act is sect. 7 (5), supplemented to some extent by sect. 7 (8). That machinery does not exactly fit the present case, because from the personal nature of the provision, the benefit of it could not be sold at all ; an outside purchaser would not obtain delivery of the goods. Nevertheless, the machinery must be made to fit. . . . It was made to fit in the Irish case of *A.-G.* v. *Jameson* (1). The value cannot be ascertained by reference to market price, because there can be no market.

The learned judge then proceeded to suggest or direct how a hypothetical market price should be arrived at. In substance the process suggested

seems to have amounted to an estimation or assessment on general business lines of the value of the thing or property in question to a person who could enjoy it. The judgment of FINLAY, J., in the present case indicates that by similar processes, often adopted and quite businesslike, the witnesses on both sides were able to provide him with proper material to arrive at a notional or hypothetical market price. Indeed, the fact that the decision of the Court of Appeal of Ireland in *Jameson's* case (1) had been acted upon for some thirty years until challenged in the present case is of itself evidence that the method of valuation then formulated was well capable of practical application. I have already given my reasons for holding that it was also the method required by the statutes.

I concur in the opinion which is, I think, held by all your Lordships that the property here in question was property falling under sect. 1 of the Act of 1894. The contention to the contrary seemed to me not to be strongly pressed and it is no disrespect to the very able argument for the respondents to say that the point appeared to be presented not so much for its inherent merits as for the opportunity it afforded for drawing attention to the fact that some of the shares left by one of the deceased shareholders would on the appellants' contention be valued for taxation at a higher price than the executors would receive for them. But as a matter of law regard cannot be had to the particular mode of disposition adopted by a shareholder, and as a matter of fact the reflection presents itself to the mind that any apparent inequality in the result is due to the voluntary choice of the testator combined with the fact that though the material subsection of the articles had been amended at some previous date the shareholders had not chosen to amend it so as to keep pace with the prosperity of the company. At the prescribed price the shares show a return of about 20 per cent. per annum, and even at the price adopted by the learned judge of about 12½ per cent. per annum.

As to the figures, for the reason given both by the LORD CHANCELLOR and by LORD RUSSELL OF KILLOWEN, I think no higher figures than the figures adopted by FINLAY, J., should be substituted for his figures, and the contention of the Crown in this respect fails.

My Lords, for these reasons I am for allowing the appeals so far as the restoration of the judgments of FINLAY, J., is asked for but not further.

Appeals allowed, and judgments of Finlay, J., restored, with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Crossman, Block & Co.* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

Re A DEBTOR (No. 994 of 1935); THE DEBTOR *v.* THE OFFICIAL RECEIVER.

[Court of Appeal (Lord Wright, M.R., Romer, L.J., and Charles, J.), **March 27, 1936.**]

Bankruptcy—Rescission of receiving order—Arrangement with creditors—Unequal treatment of creditors—Discretion.

A debtor against whom a receiving order had been made came to the following arrangement with his four creditors. The petitioning creditor was paid in full, another had accepted £50 in full satisfaction of a debt of £135, and the other two had given a release, although they had not been paid anything. The debtor applied to have the receiving order rescinded. The registrar in his discretion refused the application :—

Held : the court will only in exceptional cases interfere with the registrar's discretion. The unequal treatment of the creditors was a strong ground for refusing to interfere in such a matter.

[**EDITORIAL NOTE.** In this matter it is to be noticed that the creditors themselves were satisfied with the proposed arrangement. The difficulty was that the arrangement itself did not deal with the creditors on an equal footing. It would seem that if the creditors had all been dealt with in the same way and each had received a composition for his debt, there would have been no objection to the arrangement. The argument for the rescission of the order was that as the arrangement had been executed there were now no creditors, but the court held that even in these circumstances the registrar had a discretion to refuse the rescission of the order especially where the arrangement had been come to " behind his back."

As to Rescission of Receiving Orders, see HALSBURY, Hailsham Edn., Vol. 2, pp. 109-112, paras. 130-134 ; and for Cases, see DIGEST, Vol. 4, pp. 161-166, Nos. 1511-1553.]

Cases referred to :

(1) *Re Izod, Ex p. Official Receiver*, [1898] 1 Q.B. 241 ; 4 Digest 165, *1542*.

(2) *Re Davidson, Ex p. Davidson*, [1894] W.N. 210 ; 4 Digest 165, *1551*.

Appeal from an order of the Registrar given on Feb. 21, 1936, refusing in the exercise of his discretion to rescind a receiving order. The facts and the arguments are fully set out in the judgment of Lord Wright, M.R.

G. F. Kingham, for the appellant.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Tindale Davis*, for the respondent.

Lord Wright, M.R. : This is an appeal from a decision of the learned registrar, who has refused to rescind a receiving order. The appeal comes before this court by virtue of the Bankruptcy Act, 1914, s. 108, (1), which provides in general terms that :

> Every court having jurisdiction in bankruptcy under this Act may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

The language there is quite general, but it is well established that in a case of this sort, where the registrar has refused to rescind a receiving order, in doing so the registrar is exercising a discretion vested in him,

and a discretion which this court should not interfere with except in very exceptional and in very strong cases.

The authority which is referred to on this matter is *Re Izod, Ex parte Official Receiver* (1). That was a converse case in one sense, because there the registrar had rescinded the receiving order and the appeal was against his decision. In the present case the registrar has refused to rescind the receiving order, but what is said in *Re Izod* (1) about the discretion of the registrar is equally applicable to a case like this as to the case which the court had to consider in *Re Izod* (1). Let me read a very few words from the judgment of A. L. Smith, L.J., at page 249 where he says :

> It appears to me that the matters indicated by Lord Esher, M.R., were all considered by the registrar. He had all the circumstances of the case before him, and the official receiver was not able to inform him of any ground upon which any further investigation of the case was requisite, and he therefore considered that no further investigation was requisite. The last case on the subject is *Re Davidson* (2), which, I think, clearly shews that the registrar has a discretion in such a case as this. In that case the same registrar who decided the present case refused to rescind the receiving order, as would probably be the result in the great majority of cases, on the ground that the case required further investigation. The court there said that it was for the registrar in exercising his discretion to take into consideration all the circumstances of the case, and that it would need a very strong case to induce the court to interfere with his decision. The same principle appears to me to be applicable here, though in that case the registrar refused the application, while in this case he allowed it.

The case now before the court is a case in which the registrar refused the application, and he states the considerations under which he did so very clearly in his note. The first thing to notice is that the official receiver has had the matter before him and has prepared a long statement which has been read to this court. The registrar's note says :

> The Official Receiver says it is a case for a composition under the Act, not an arrangement to be made by debtor outside the Act. This arrangement does not deal with all creditors alike.

Then Mr. Kingham, on the other side, argued :

> Only a few debts. Debtor went to all his creditors—they are friendly to him. I have a general discretion. Why should a man be made a bankrupt if he now has no creditors ?

Then the registrar states his decision :

> I do not see any reason for interfering in this matter—

that is to say, for rescinding the receiving order—

> The creditors have not been treated on an equal footing. There has been no payment in full. The debtor settles behind the back of the court. Sect. 16 would otherwise almost be a dead letter. Debtor's release from bankruptcy should be by way of discharge and not rescission.

Thereupon the learned registrar dismissed the application. A stay of

advertisement had been originally granted, and it was continued until the hearing of the appeal to this court.

Now, as I read this statement by the learned registrar, he has considered all the facts that were put before him and he has in no sense at all misdirected himself on any principle of law. I quite feel that this is a somewhat exceptional case, and I should have been strongly disposed to take some other course if it had not been that it would, I think, be very undesirable to interfere with a general discretion in matters of this sort, in the absence of exceptional circumstances, not merely circumstances of hardship or sympathy, and say the registrar's decision should be reversed In this particular case the debtor owed four separate debts: a debt of £84 6*s*. 8*d*. to the petitioning creditors, who held a security valued at £30; £135 to a Mr. Michael Cohen; £210 to a trading company; and £104 to some forwarding agents. The debtor had engaged in a small business, dealing with furs, and unfortunately some transactions in which he was concerned involved him in a serious loss and he was left with these four debts. They have been dealt with in this way: the petitioning creditors have been paid in full, partly by a cash payment of £54 18*s*. 8*d*. and partly by the sum realised on their security; Mr. Michael Cohen, who had been engaged in business with the debtor, and to whom the debtor owed £135 as a balance of certain loans which had been made, has received £50 in cash, which has been accepted in full satisfaction; the other two creditors, the creditor for £210 and the creditor for £104, have not been paid at all: one of the creditors has given a release under seal, the other has given a release by a simple receipt. I do not stop to consider whether either the balance of the debt of Mr. Michael Cohen or the whole debt of the forwarding agents has been satisfied in law; it is not necessary to consider that; but it is perfectly clear from that statement, without considering where the sums came from which the debtor used to pay the creditors so far as he could make payment, that the debts have not been paid in full, that the creditors have not all been treated on the same footing, and if the official receiver, who has had the matter in charge, is of opinion that it is a case in which there should be a public examination and the further proceedings which take place in bankruptcy, and the registrar, exercising his discretion on that statement, has refused to rescind the receiving order, it is certainly not a case in which there are any exceptional circumstances which would justify this court in departing from the ordinary rule not to interfere with that discretion.

There is one matter which has certainly caused me some little difficulty. It is not a difficulty to which I ought to give effect, because it is rather a matter of sympathy than of law. The debtor, being a director of a small company at a weekly salary, will have to take proceedings under the Companies Act to maintain his position as a director. I understand

that these proceedings are of a very formal nature, and very inexpensive, and though I have every hope that these proceedings will be successful, I do not find in that circumstance any justification for departing from the ordinary principles which ought to guide the court in dealing with matters of this sort.

Romer, L.J.: I agree. The learned registrar exercised his discretion in this case, and it is impossible to say that he exercised that discretion on any wrong principle. That being so, it is impossible for this court to interfere with his order. I would, however, like to add this. It does seem to me to be of the utmost importance that debtors should realise that after a receiving order has been made they cannot safely negotiate or treat with their creditors behind the back of the official receiver. The official receiver was described by A. L. Smith, L.J. in *Re Izod* (1) at page 246 as being:

> the officer of the court whose duty it was to stand between the debtor and his creditors.

In *Re Izod* (1) an arrangement was indeed made with the creditors otherwise than through the provisions of what then corresponded to the Bankruptcy Act, s. 16, and in spite of that fact the registrar and the court allowed the receiving order to be discharged. That was because, as was pointed out by A. L. Smith, L.J., the official receiver

> was all this time superintending the proceedings;

and Collins, L.J., said this at page 255:

> The proceedings have been carried on under his eye—

that is, the eye of the official receiver—

> ever since July, and he has apparently been an assenting party to all that has been done.

In this case, unfortunately, the debtor dealt with his creditors behind the back of the official receiver, and it is because he did that that he now finds himself in the position that very shortly he will be adjudicated a bankrupt.

I agree that this appeal fails.

Charles, J.: I agree.

Solicitors: *Edmond O'Connor & Co.* (for the appellant); *Solicitor to the Board of Trade* (for the respondent).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

HODDESDON URBAN DISTRICT COUNCIL *v.* BROXBOURNE SAND AND BALLAST PITS, LTD.

HERTFORDSHIRE COUNTY COUNCIL *v.* BROXBOURNE SAND AND BALLAST PITS, LTD.

[RAILWAY AND CANAL COMMISSION (MacKinnon, J., Sir Francis Taylor, K.C., and Sir Francis Dunnell), **March 18, 1936.**]

Highway—Diversion—Sand pit—Grant of ancillary right—Jurisdiction of Railway and Canal Commission—Mines (Working Facilities and Support) Act, 1923 (*c.* 20), *s.* 3.

The applicants wished to divert or stop up a footpath crossing a field in which they had a right to dig for sand and gravel. The highway authority was approached with a view to obtaining the usual order from quarter sessions for the stopping up or diversion of the pathway under the Highway Act, 1835, ss. 84 and 85. No agreement being come to, the applicants applied to the Railway and Canal Commission for a grant of an ancillary right under the Mines (Working Facilities and Support) Act, 1923, s. 3, viz.: the extinction or diversion or the lowering of the surface of the footpath :—

HELD: there were no such clear words in the Mines (Working Facilities and Support) Act, 1923, s. 3 as could confer on the Railway and Canal Commission a concurrent jurisdiction with quarter sessions to make an order for the stopping up or diversion of a highway and the order asked for could not be made.

[**EDITORIAL NOTE.** There is here a suggested conflict of statutory jurisdiction. It is clear that the proper mode of stopping up or diverting a highway is by an order of quarter sessions made under the Highway Act of 1835. It was suggested that the Railway and Canal Commission have a concurrent jurisdiction under the Mines (Working Facilities and Support) Act, 1923, s. 3, but the court held that the wording of that section was not clear enough on the point to take away the undoubted jurisdiction of quarter sessions, and the proper course where it is desired to extinguish a public right of way is to proceed under the Highway Act, 1835. The opinion of the court appeared to be that an order under sect. 3 of the 1923 Act might grant a privilege to lower the surface of a highway, but not to take that surface away altogether. In considering this case it is necessary to bear in mind that under the Highway Act, 1835 an order to stop up a public highway can only be made on the ground that it is unnecessary for the proper requirements of the public and an order to divert can only be made on the ground that the new way is more convenient to the public. It would appear therefore that the owners of the sand pit could not apply for an order by reason of their own requirements, but must show that it was in the public interest to divert the footpath or that it had become unnecessary by reason of non-user and the provision of better facilities.

FOR THE STOPPING UP AND DIVERSION OF HIGHWAYS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 264-273, paras. 322-336, and FOR THE CASES, see DIGEST, Vol. 26, pp. 476-487, Nos. 1889-1991. AS TO THE MINES (WORKING FACILITIES AND SUPPORT) ACT, 1923, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 12, p. 181.]

APPLICATION by the Broxbourne Sand and Ballast Pits, Ltd., under the Mines (Working Facilities and Support) Act, 1923, s. 3, for an ancillary right involving the extinction or diversion or the lowering of the surface of a certain public footpath. The facts upon which the

application was made are fully set out in the judgment of MacKinnon, J.

E. J. Rimmer for the applicants for the scheme.

David Bowen for the objectors to the scheme.

MacKinnon, J.: In this case the applicants are in possession of a certain field, either as freeholders or as leaseholders—it does not matter which—and by virtue of possession of that field they have the right to dig sand and gravel from it, and up to a certain point they have done so. There is running across the field what is admitted to be a public right of way, a footpath. The further prosecution of their business in taking away the sand and gravel is hampered or made difficult, by reason of the existence of that footpath, and the right of members of the public to walk along this footpath with which the applicants must not interfere. There is in existence legal machinery by which an existing highway, a public right of way, may be diverted or put an end to. That is under the Highway Act, 1835, ss. 84 and 85. There is the well-known procedure by which with the consent of the local authority on the certificate of two justices, an order is sought from quarter sessions that a highway, or a footpath, or a right of way may be either stopped up or diverted. The authority concerned in this case as regards this right of way, is the Hoddesdon Urban District Council, and the Hertfordshire County Council have some interest in it. As I gather, some negotiations went on between the applicants and the Hoddesdon Urban District Council with a view to its being arranged that the difficulty about this footpath should be got over. I have not read the letters, but I see that the correspondence ended with a fairly lengthy letter from the solicitors of the Urban District Council dated Nov. 23, 1935, stating the terms on which the urban district would consent to an application to vary the route of the footpath subject to the approval of quarter sessions under the Act of 1835. That was in November. The applicants apparently did not think that a satisfactory proposal, and accordingly they lodged this application with this court on Dec. 30, 1935, applying for the grant of an ancillary right under the Mines (Working Facilities and Support) Act, 1923, s. 3. The application under that Act is clearly not anything to do with sect. 1. There is no difficulty about any power to work the minerals which would not be otherwise workable, because the whole of the minerals either belong to the applicants, or they have a right to work them so far as the ownership of the soil of the field is concerned. Their application is, and must be, solely under sect. 3. That section provides:

> (1) Where any facility, right, or privilege is required in order that minerals may be properly and conveniently worked by the persons entitled to work the same, and the proper and efficient working of the minerals is unduly hampered by the inability or failure of that person to obtain such right, facility, or privilege (hereinafter referred to as an ancillary right), such ancillary right may be conferred

in the manner and subject to the provisions hereinafter appearing on the person having the right to work the minerals who is working or desirous of working them either by himself or through his lessees.

The ancillary right that is asked for is set out in para. 3 of the application :

The ancillary right for which we apply is as follows : The extinction or diversion or the lowering of the surface of the public footpath shewn upon the said plan and coloured green.

That phraseology is a little inaccurate. It is not really the lowering of the surface ; it is the removal of the surface and the substitution of a new surface at a lower horizontal plane. It is not a case of digging underneath the surface and so letting down the old surface, but it is a case of taking away the surface and so revealing underneath it a new level of surface.

That being the application of the applicants, the Urban District Council put in their objections and the material passage in them is in para. 4A, in which they say :

The objectors further say that the right applied for (whether for extinction, diversion or lowering of the said footpath) is not a right to work or an ancillary right within the Mines (Working Facilities and Support) Act, 1923, and that consequently this Honourable Court has no jurisdiction under the said Act to entertain the application.

The Hertfordshire County Council, who similarly lodged objections in para. 6A, say :

That the procedure laid down by the Highway Act, 1835, and the Local Government Act, 1894, where it is desired to stop up or divert a highway must exclusively be followed ; and these enactments require an order of the court of quarter sessions.

I think that the short point which is involved here is a point of law, and it is a point of law with which it is desirable that we should deal as a preliminary question without hearing evidence and going into all the facts. That point of law seems to be whether, in a case where manifestly an order of quarter sessions under the Highway Act, 1835, ss. 84 and 85 could be made for the extinction or diversion of the surface of a public footpath, in a case where that is possible, there is an alternative right and power to make an application to this court and in effect to get the same sort of order by the grant of an ancillary right under sect. 3 of the Act of 1923. As there is that legal method of extinguishing or diverting a footpath in existence, I think that it is pretty obvious that for the company to succeed there must be quite clear words in another Act of Parliament which confer upon this court a concurrent jurisdiction to that of quarter sessions to make an order to the same effect. I am quite satisfied that the language of sect. 3 of the Act of 1923 certainly does not clearly, and, as I think, does not at all, confer

that concurrent jurisdiction upon this court, but in addition to the lameness of language of sect. 3 to effect any such purpose, I think that it is material to observe that sect. 13 of the Act, which is the savings section, says this, leaving out immaterial words : " Nothing in this part of this Act shall prejudicially affect . . . any right of support from minerals to which any such . . . authority . . . may be entitled " and " any such authority " is the repetition of the reference just above to a " local authority or other statutory body." Even if *prima facie* it might be thought that the language of sect. 3 was sufficient to enable us under the guise of granting an ancillary right to make an order in effect equivalent to the order of quarter sessions under the Act of 1835, I think that the effect of that section would mean that we ought to take it in mind and say that if you so interpret sect. 3, you are prejudicially affecting the right of support from the minerals to which this local authority is entitled. On this question, therefore, I think that when an application is made, as this is, the object of which is solely the obtaining of an order from us to extinguish or divert a footpath, it is not within the jurisdiction of this court to grant it. Reference has been made to the *Sheffield Coal Company's* case, in which we did, as a very small part of a very large order, make some order which interfered with an existing right of way or a public footpath. That was, as I say, only quite a small and incidental part of a long order granting very substantial rights under sects. 1 and 3 of the 1923 Act, and, if I remember aright, under the enlarged powers as regards coal mines given under the second part of the Act of 1926. Unfortunately counsel have not been able to remind us of the terms of the judgment, but my recollection is that in that case, although some question had been debated at one stage of the argument as to whether this court had power to deal with footpaths in this case, ultimately any opposition by the local authority was withdrawn and that part of the order was made with their assent and consent. In such a case as that it is conceivable that if somebody was concerned to say that we were usurping the powers of quarter sessions under the Act of 1835, such an argument might have prevailed. If it was outside our strict rights, no one was concerned to contest it, because it was only quite an incidental part in the making of a long order as regards all sorts of varied rights and facilities, and it would obviously have been extremely inconvenient if, the matter having been agreed between the local authorities and the applicants, with regard to that small portion of the rights that they were to obtain, it had been necessary to go through the additional expense and delay of getting the formal orders assented to by the local authority under the Act of 1835.

Sir Francis Taylor : I agree. In my opinion it is also not made out that this application is an application that, properly viewed, comes

within sect. 3 of the Act of 1923. It is an application to extinguish a highway, and I do not think that it can be regarded as an application to let down the surface of the footpath. If that is right, it does not seem to me to come within the terms of sect. 3 as being a facility, right, or privilege which is required for the efficient working of the minerals in which the applicants are hampered. No doubt they are hampered, but they are hampered because they are unable to win and carry away the minerals which constitute the surface. Therefore, in addition to the reasons which my Lord has given, I think that the applicants fail on the ground that they do not bring themselves within the section.

Sir Francis Dunnell: I agree, and I have no observations which I desire to make.

Solicitors: *Kenneth Brown, Baker, Baker* (for the applicants); *Sharpe, Pritchard & Co.*, agents for *Longmores*, Hertford (for the objectors, Hoddesdon U.D.C.); *Sharpe, Pritchard & Co.*, agents for *P. Elton Longmore*, County Solicitor, Hertford (for the objectors, Hertfordshire County Council).

[*Reported by* Frank Rowe Esq., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* NEW SHARLSTON COLLIERIES CO., LTD.

[King's Bench Division (Lawrence, J.), **March 26, 27, 1936.**]

Income tax—Mining lease—Right to let down surface—Easement—Finance Act, 1934 (*c.* 32), *s.* 21.

In a mining lease certain rents were reserved as consideration for the right to let down the surface. In assessing the lessees to income tax under Sched. D, Case I, the commissioners refused relief in respect of these rents contending that they were payments in respect of an easement within the Finance Act, 1934, s. 21:—

Held: the right to let down the surface was an incident of the land itself which had been charged to tax under Sched. A and was not therefore an easement within the Finance Act, 1934, s. 21.

[**Editorial Note.** The point decided in this case is whether the usual right to let down the surface of the land given in a mining lease is an easement within the definition of that word given in the Finance Act, 1934, s. 21 (4) (*b*). Easement is there defined to include "any right, privilege or benefit in, over or derived from land," and it is decided that the right in question is not within such definition, as the rent reserved in respect of this right having been brought into charge under Sched. A, it cannot be again brought into charge under Sched. D. That this right was an incident of the land itself was decided in the House of Lords in the case of *Elliott* v. *Burn*, [1935] A.C. 84, and the right conferred in the agreement here in question was in the same terms as in that case.

As to Assessment of Surface Damage Payment, see HALSBURY, Hailsham Edn., Vol. 17, p. 141, para. 283; and for Cases, see DIGEST, Vol. 28, p. 8, No. 28 and Supp. For the Finance Act, 1934, s. 21, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 27, p. 342.]

Cases referred to :

(1) *New Sharlston Collieries Co., Ltd.*, v. *Westmorland* (*Earl*) (1900), [1904] 2 Ch. 443, n ; 34 Digest 713, *982.*

(2) *Elliott* v. *Burn*, [1934] A.C. 84 ; 18 Tax Cas. 595 ; Digest Supp.

CASE STATED under the Income Tax Act, 1918, s. 149, and the Finance Act, 1923, s. 24, by the commissioners for the special purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The respondents are entitled, under a lease dated June 24, 1865, to mine a certain seam of coal. The lease reserved a right of support which was confirmed by a decision of the House of Lords (*New Sharlston Collieries Co., Ltd.*, v. *Westmorland* (*Earl*) (1). The tenant for life thereupon granted and demised to the respondents full and free liberty, power and authority to work, get and carry away the whole of the said mines, veins and seams of coal comprised in the lease, notwithstanding that such working might cause subsidence of or withdrawal of support from the surface, in consideration of "rents thereinafter reserved."

The Commissioners of Inland Revenue refused relief from income tax under assessments made under Case 1 of Schedule D in respect of the rent, and contended that this sum was payable in respect of an easement within the meaning of the Finance Act, 1934, s. 21, and therefore constituted a payment of rent. The Special Commissioners decided that the respondents were entitled to relief under the Finance Act, 1923, s. 24, and that the advantage which they enjoyed was a contractual one and did not amount to an easement, and therefore did not fall within the Finance Act, 1924, s. 21. The Commissioners of Inland Revenue appealed.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellants.

J. H. Bowe for the respondents.

LAWRENCE, J. : In this case I am in agreement with the judgment of the Special Commissioners. The respondents, who are a mining concern, the New Sharlston Collieries Company, Limited, claim to deduct sums payable under a mining agreement in respect of the right to let down the surface, and whether they are entitled to deduct those sums depends upon whether they are or are not within the Finance Act. 1934, s. 21. The respondent company hold the collieries in question under a lease dated June 24, 1865, and after the decision in the case of *New Sharlston Collieries Co., Ltd.*, v. *Westmorland* (1), they entered into a new agreement, dated July 31, 1901, under which the company agreed to pay £1,000 a year as rent, and a further acreage rent of £7 10*s*. for the right to let down the surface. Both under the original lease and under that indenture of 1901 the collieries company were bound to pay compensation in the event of damage being done to buildings on the surface.

The case really turns upon a construction of sect. 21, having regard to the decision of the courts, and particularly of the House of Lords, in *Elliott* v. *Burn* (2). That was a case which was decided before the passing of the Finance Act, 1934, but the facts of which I am invited to treat as being precisely on all fours with the facts of this case, and which in fact seem to me to be in no material respect different from the facts of this case. In that case the House of Lords held that the payment which had to be made by the colliery company in question there was not a profit within the meaning of Schcd. A, No. II, r. 7, and therefore it was not a decision and could not be, of course, a decision upon the statute which is now before me ; but in my opinion, having regard to the passages in the judgments in *Elliott* v. *Burn* (2), to which my attention has been referred, and particularly to the judgment of Lord Warrington, which was unanimously agreed to in the House of Lords, what they decided was that the right conferred by the agreement there in question (which, as I have said, I am treating and hold to be indistinguishable from the agreement now in question) was an incident of the land itself which has already suffered tax under Sched. A, No. I. Now, it seems to me that the Finance Act, 1934, s. 21, is not directed against profits arising from land the property in which has been separately assessed and charged ; and it appears to me, therefore, that the definition of the word easement ought not to be read so as to include a right which, as the House of Lords has held, is incident to and part of land the property in which has already been assessed and charged. I therefore read the words in the definition of easement in sect. 2 (4) as not covering property which has been separately assessed and charged, and as I understand the decision of the House of Lords to be that this right to support in respect of which this payment was made to be an incident and part of the property itself, in my opinion it has already suffered tax under Sched. A, and is therefore not an easement within the meaning of sect. 21.

I therefore agree with the decision of the special commissioners in this case, and dismiss the appeal with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellants) ; *Blundell, Baker & Co.*, agents for *Greaves, Atter & Beaumont*, Wakefield (for the respondents).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

ASHTON AND OTHERS *v.* WAINWRIGHT.

[KING'S BENCH DIVISION (Goddard, J.), **March 12, 1936.**]

Solicitors—Negligence—Registration of club—Duty of solicitor.

The plaintiffs were officers of the New Atlantic Club, which desired to move into premises formerly occupied by the Danesbury Club, which had been dissolved. The plaintiffs retained the defendant as their solicitor *inter alia* to arrange for the transfer of the registration of the New Atlantic Club. The defendant sent the necessary documents to the justices' clerk who refused the registration on the ground that the Danesbury Club was on the register as of that address, but the papers were left at the clerk's office. It was found as a fact that the defendant never notified the plaintiffs of this refusal, and the New Atlantic Club moved into their new premises. The police raided the club and the plaintiffs were prosecuted and fined for supplying drink at an unregistered club. In an action for damages for negligence, the defendant denied negligence and contended that even if he was negligent the damage to the plaintiffs resulted not from his negligence, but from a decision of the magistrates which was wrong in law :—

HELD : (i) the defendant was negligent in not notifying the plaintiffs of the clerk's refusal to accept registration of the New Atlantic Club at their new premises ;

(ii) notwithstanding that the clerk's duty was purely ministerial and that he could not decide whether the club should or should not be registered, the leaving of the registration papers was not sufficient to register the club, and the convictions were right ;

(iii) in considering the damages recoverable no reduction should be made because the fines have been paid out of club funds.

[**EDITORIAL NOTE.** The registration of a club is purely a ministerial act upon the part of the justices' clerk. If an application form properly filled in is delivered to him accompanied by the proper fees he has no discretion in the matter and must register the club. In the present matter, however, the clerk refused to do so upon the ground that there was another club already registered as occupying the same premises. This case, however, is not directly concerned with the position of the justices' clerk or the registration. The justices' clerk having refused the registration, the solicitor acting for the applicant decided that the refusal was inoperative and the registration was effected and allowed his clients to act upon that view. It is here held that he was wrong in doing so and that he ought to have advised his clients that, having regard to the refusal, the registration could not be taken as effected and that they ought to apply for a mandamus to secure the registration.

AS TO REGISTRATION OF CLUBS, see HALSBURY, Hailsham Edn., Vol. 4, p. 513, para. 955 ; and FOR CASES, see DIGEST, Vol. 8, p. 524, Nos. 123-125 ; as to OBLIGATIONS OF A SOLICITOR TOWARDS HIS CLIENT, see HALSBURY, 1st Edn., Vol. 26, Solicitors, p. 756, para. 1,254 ; and FOR CASES, see DIGEST, Vol. 42, pp. 100-107, Nos. 940-1012.]

Cases referred to :

(1) *Lees* v. *Lovie*, [1912] 2 K.B. 425 ; 8 Digest 524, *125.*
(2) *De Ponthieu* v. *Pennyfeather* (1814), 5 Taunt. 634 ; 26 Digest 477, *1901.*
(3) *R.* v. *Yarborough* (*Earl*) (1840), 12 Ad. & El. 416 ; 33 Digest 429, *1424.*
(4) *Fox* v. *Davies and Another, Shaston St. Peter* (*Overseers*) (1848), 6 C. B. 11.
(5) *R.* v. *Joint Stock Co.'s Registrar* (1888), 21 Q.B.D. 131 ; 16 Digest 302, *1152.*

ACTION for damages for negligence, alleging that a solicitor had not fulfilled his obligations towards his client in the matter of a registration

of a club. The facts and arguments are fully set out in the judgment.

Richard Elwes for the plaintiffs.

Graham Swanwick for the defendant.

Goddard, J.: In this action which was tried before me at Lincoln, the plaintiffs claim damages against the defendant for negligence as their solicitor. There was a plea on the record denying the retainer, but this was abandoned at the trial, in my opinion quite rightly, and the case proceeded upon the footing that the defendant had undertaken the duty of advising the plaintiffs in the matters to which this action relates.

The plaintiff, Hill, is the treasurer and paid official of a working-man's club, known as the New Atlantic Club, with a registered address of 21, St. Peter's Avenue, Cleethorpes, and the other plaintiffs are committee-men of the club. At No. 26, St. Peter's Avenue was another club, called the Danesbury. The latter premises were owned by Messrs. Sergeants, brewers, of Brigg, who also supplied beer to the plaintiffs' club. The Danesbury club had been in trouble of some sort with the Excise, the officials had disappeared, the club had apparently been dissolved and the premises were empty. The New Atlantic Club desired to become the occupants of these premises and the plaintiffs or Hill approached Messrs. Sergeants with this object. They were told to get a solicitor to act in the matter, which consisted not only in preparing a tenancy agreement, but in getting the registration transferred to the new premises. Hill, on Messrs. Sergeants' recommendation, asked the defendant to act; he consented, and on Dec. 19, 1934 he wrote to Mr. Lees, of Messrs. Sergeants, as follows:

> Danesbury Club. Dear Sir, We have been instructed by Mr. W. Hill to act for him in connection with the transfer of the New Atlantic Club from the premises they at present occupy to the premises known as Danesbury Club. We are also informed by Mr. Hill that the legal charges and expenses in connection with the transfer will be borne by Messrs. Sergeants. We have arranged to travel with Mr. Hill to Brigg to-morrow (Thursday), and hope to be able to see you at the brewery at about 12 o'clock to complete the necessary arrangements.

An interview at Brigg followed, upon which nothing turns except that Messrs. Sergeants agreed to be responsible for the defendant's costs. It seems that at this time the police were desirous of getting the Danesbury Club struck off the register but there was difficulty about the summons, there being no officers upon whom to serve it. The defendant formed the opinion, whether righly or wrongly I do not need to consider, that the club had ceased to exist in fact and also for the purposes of the Licensing Acts and that if it was not re-registered during the month of January it could as regards registration be ignored. The plaintiffs were anxious to get into the new premises as early as possible and wanted to

do so by Feb. 1, indeed they put workmen into the rooms during January to do certain necessary repairs.

On Jan. 28, the defendant sent his son to the office of the clerk to the county justices at Grimsby, with the necessary forms for the registration of the New Atlantic Club at 26, St. Peter's Avenue, together with 5*s*., the prescribed fee. It seems that Mr. Mountain, the clerk, was not in, but the defendant's son was told by the gentleman he saw at Mr. Mountain's office that the registration could not be accepted as the Danesbury Club was on the register as of that address and he refused to accept the form or fee. On this being reported to the defendant by his son, he instructed the latter to take the form back again and re-tender it. The defendant had formed the opinion that the clerk was wrong and was bound to register the club, on the ground, as I understood him, that the Danesbury Club was defunct. Mr. Mountain's clerk, however, maintained his position, but consented to the form and fee being left at the office pending the return of Mr. Mountain who would have to decide on the matter. This was duly reported to the defendant.

No communication was received by the defendant from Mr. Mountain that day, so it is at least remarkable that by that evening's post he wrote the following letter to Hill:

> New Atlantic Club. Dear Sir, We beg to inform you that we have this day registered this club as a members club in the occupation of 26 St. Peter's Avenue, Cleethorpes. You should be careful to see that no intoxicating liquors are sold or consumed on the premises. We have notified Messrs. Sergeants of the registration, and we have submitted to them a form of agreement for their approval. As soon as we have obtained this form approved, we will make an appointment when your Mr. Hill can sign it and the matter will then be completed.

The notification to Messrs. Sergeants was apparently the letter of Jan. 26, in these terms:

> New Atlantic Club. Dear Sir, We are now in a position to complete this matter and are arranging with the magistrates' clerk for the registration of the New Atlantic Club at the premises formerly occupied by the Danesbury Club. We enclose herewith a draft tenancy agreement which we shall be glad if you will peruse and return to us approved.

On the next day, after some conversation on the telephone, Hill met the defendant and spent some hours in his company, and the defendant was also at the New Atlantic Club that evening. There was a direct conflict of evidence between the defendant and Hill as to whether the former revealed the difficulty that had arisen and also whether the letter which he received from Mountain during the next day was read to Hill over the telephone.

I have no hesitation in accepting the evidence of Hill and Wood on this matter. I am quite satisfied that at no time did the defendant

say anything to the plaintiffs as to the magistrates' clerk having refused to register the club, and I am also satisfied that had he done so they would not have moved into the new premises as they did on Feb. 1. Further, I am satisfied that on Jan. 29 the defendant told Hill at the club that they could move in on Feb. 1 if they wanted to, and that the only warning he gave him was to repeat what he had already said in his letter of the previous day, that as they were registered at the new address no liquor should be sold at No. 21 St. Peter's Avenue. I am also satisfied that Mr. Mountain's letter of Jan. 30 was not communicated to the plaintiffs, it was a clear refusal by him to register the club at the new address and the answer of the defendant was written on the same day. The two letters are these. Mr. Mountain wrote on Jan. 30 to the defendant:

> New Atlantic Social Club, Cleethorpes. With reference to the return under the Licensing Acts, furnished in respect of the above club, I return same herewith together with P.O. value 5*s*., registration fee. The premises 26 St. Peter's Avenue, Cleethorpes, which are stated to be the address of the club, are already registered in the name of the Danesbury Club, which is still apparently in existence and is expected to register.

The answer was this:

> With reference to your letter of this date we return you herewith the return under the Licensing Acts, together with postal order value 5*s*., the amount of the registration fee. The premises of 26 St. Peter's Avenue, Cleethorpes, are the property of Messrs. A. M. & E. Sergeant, Ltd., brewers, Brigg, who have agreed in writing to let these premises to the New Atlantic Social Club as from Feb. 1 next. We are aware that the premises in question were formerly in the occupation of the Danesbury Club, but we are informed by our clients, Messrs. Sergeants, that this club has ceased to exist and that the premises have been vacant for some months and that the Danesbury Club or its committee, is indebted to them in a considerable amount of money. We quite fail to see how any persons purporting to represent a non-existent club can claim to register a club bearing the same name at premises which they have no authority to occupy. We have advised our clients, Messrs. Sergeants, of Brigg, and the New Atlantic Social Club, that as from Feb. 1, the club will be entitled to go into the occupation of the premises, in respect of which a tenancy agreement has been signed.

There is a clear statement by the defendant that he has advised both sets of clients that they can go into these premises. The letter continues:

> We venture to think that you have no power to refuse the return, and shall be glad if you will reconsider the position. Please bear in mind that the New Atlantic Club has given notice terminating its tenancy of the premises it at present occupies and has entered into an agreement with respect to the premises 26 St. Peter's Avenue, Cleethorpes. We would also point out to you that although a club is allowed the month of January in which to re-register, if in fact it has ceased to exist previously to Dec. 31, and has not been struck off the list of clubs on that or any other ground it is not, after Dec. 31, a registered club. We gave notice as long ago as Dec. 24 last to this effect on the instructions of the landlords.

Meanwhile the club had moved into new premises, and though it may not be material, I do not doubt that the defendant knew they had; it is at least clear that he was told on Jan. 29 that they were going to do so. It is remarkable that not only had he not told the plaintiffs of the difficulty that the attitude of the justices' clerk had caused, but he did not report it to Messrs. Sergeants, who were paying his costs and were considerably interested in the matter as the landlords of the premises, until Feb. 4, and then said nothing about the club having taken possession. Nor did he tell the brewers what he said in evidence, that he had told the club or Hill that if they went in they would go at some risk to themselves. The letter to the brewers on Feb. 4 is as follows:

> New Atlantic Club, Cleethorpes. We are having a good deal of difficulty and trouble with the clerk to the magistrates over the premises formerly occupied by the Danesbury Club. The magistrates' clerk and the superintendent of the police now take the view that the Danesbury Club must be struck off before they can accept the registration of the New Atlantic Club and applications are being made to the magistrates to that end. We presume that you will wish us to attend on your behalf, as the owners of the property, to consent to any order the magistrates see fit to make. Please let us have the draft agreement so that we can put this matter in order

As to the word "now" in that letter, it is at least observable that the magistrates' clerk had taken up the same attitude which he was then taking up from a very much earlier period, and indeed had taken it up at the time that the letter of Jan. 28 was written by the defendant to Messrs. Sergeants. It is due, I think, to the defendant to say that he had formed the opinion that the magistrates' clerk was wrong in his view of the law, and on one matter, as will later appear, in my judgment, the defendant was right and Mr. Mountain was wrong; but it is difficult to find any excuse for him in not informing his clients of the position and in not telling them to wait for the few days that would have to elapse before the Danesbury Club was struck off the register. The serious results that have followed would then have been avoided.

It is needless to speculate as to why he took the attitude that he did, but in my judgment in failing to inform his clients of the position so as to give them the chance, at any rate, of deciding whether they would risk a move, as I am satisfied they would not have done, he was clearly guilty of a breach of duty towards them.

The rest of the story is soon told: on Feb. 6 the police raided the club and seized the stock of liquor found on the premises, and the plaintiffs were prosecuted for supplying drink at an unregistered club. Each of the plaintiffs were fined £10, and a sum of £4 was imposed for costs. Not only that, but at the same court the Danesbury Club was struck off the register, and the premises was disqualified for being used as a

club, I suppose because of an unregistered club being found upon them after their occupation by a club the conduct of which had been unsatisfactory.

Some criticism has been directed both by the plaintiffs and the defendant at the fines imposed as unduly heavy, especially as it is agreed that the defendant who appeared before the justices for the plaintiffs, told the bench that whatever they had done had been in consequence of acting on his advice. It is no part of my duty to criticise the magistrate's decision, nor have I any wish to do so, first because I have not heard what they have to say, and secondly because I observe that the defendant did not tell the bench that he had left the plaintiffs entirely in the dark as to the attitude of the magistrates' clerk. Had he done so, the fines might have been lighter; as it was the case may well have appeared to the justices as a deliberate flouting of a warning that had been given. If the justices got a wrong impression of the facts, I am bound to say that the responsibility for this lies on the defendant. But Mr. Swanwick, whose argument was well-reasoned and of great assistance, submitted that even if the defendant was negligent, the damage has resulted not from that negligence but from a decision of the magistrates which was wrong in law. He says, quite rightly, that the conviction affords no estoppel against the defendant, and that if he can show that the conviction was wrong, then the defendant is not liable for damage in the shape of the fines and costs that the plaintiffs have sustained. That, I think, is sound, so the question is was the conviction wrong? The conviction was for selling intoxicating liquor at an unregistered club and Mr. Swanwick's main point is that the club was registered, because the provisions of the Licensing Consolidation Act, 1910, s. 9 (1) had been complied with, in that the officials of the club had sent to the clerk the necessary information as required by the section, together with the proper fee. He contends that the clerk had no right to refuse registration, first because his duties are purely ministerial, and secondly because there is nothing in the Act which prohibits two clubsbeing registered at the same address. On this last contention, namely, whether two clubs can be registered at the same address, I do not think it necessary to give a decided opinion; I am inclined to think that Mr. Swanwick's contention is sound, as there is nothing in the Act forbidding it, though I think it may be a ground for striking one or both off the register, as the justices might consider that in these circumstances the clubs were not properly conducted. But it is not necessary to decide this point, for whatever the true view may be, the clerk to the justices is not the person to decide it. The case of *Lees* v. *Lovie* (1), clearly decides that the functions of the clerk to the justices in relation to the registration of clubs is purely ministerial and that he has neither the right nor the duty of deciding whether a club can or cannot be properly registered. In that

case the clerk registered a club although he was of opinion, and as the court held rightly of opinion, that as it had been previously struck off the register it was incapable of being registered again, even at another address. Both the Lord Chief Justice and PICKFORD, J., as he then was, stated that the clerk's duty was ministerial only and that neither he nor any other official could decide whether a club should be registered or not; the court said that all the secretary had to do was to furnish the necessary particulars and then the clerk was bound to register it.

So, argues Mr. Swanwick, directly the particulars are left with the clerk, the club is automatically registered. In my judgment that is not sound. If the clerk accepts the particulars for registration, then no doubt the club is registered, even though he may, owing to forgetfulness or any other reason, omit actually to enter them in the register; see *De Ponthieu* v. *Pennyfeather* (2). But if the clerk refuses the particulars, or if he says: "Well, even if you leave them I will not register the club," although he is wrong in taking up that attitude, I do not think it can be said that the club is registered. When a ministerial officer refuses to perform his duty, a mandamus lies to compel him to do so and there are many instances to be found in the books of the writ being granted in such circumstances. He would, I suppose, be liable for an action for damages if his refusal caused injury to the person who had required of him the performance of his duty. Now, if it be the law that when a ministerial officer refuses to do that which the law directs him to do the act may be regarded nevertheless as done, there would have been no need for the court to grant a mandamus; the prosecutor of the writ could have ignored the refusal and taken the act as done.

No authority was cited in support of this contention except *De Ponthieu* v. *Pennyfeather* (2), which I have already referred to, which seems to me only to show that in this case if Mr. Mountain had accepted the form for registration but for some reason of his own merely omitted to copy it on to the register, the club could not have been regarded as unregistered. But authority to the contrary may be found. In *R.* v. *Yarborough (Earl)* (3), it was held that the allowances of a poor rate by two justices of the peace was purely a ministerial act, and the reason given by LITTLEDALE, J., for granting the mandamus to the justices to allow the rate was:

> if the justices refuse to allow the rate, there is no power to amend; and therefore there will be no rate.

In the subsequent case of *Fox* v. *Davies* (4), the Court of Common Pleas held that a rate which had not been allowed by the justices was void, although the act of allowance was ministerial and not judicial. I may also refer to the case of *R.* v. *Registrar of Joint Stock Companies* (5), where WILLES, J., said he had no doubt that mandamus would lie against

the registrar in a matter in which he had no discretion. These cases appear to me to dispose of the contention that when a ministerial officer refuses to perform an act as required by law, the act can be regarded as done.

The club therefore was unregistered, and consequently the convictions were, in my judgment, right. As they were a direct consequence of the defendant's failure to inform the plaintiffs that registration had been refused, he is liable to them for the penalties and costs that they have had to pay.

Two further points were taken on behalf of the defendant as to damages. It appears that the fines have been paid for the plaintiffs out of club funds, but Wood told me that if they recovered damages they would have to repay the club. This will not avail the defendant. If by the negligence of my solicitor I incur a fine, the fact that a charitable person helps me to pay it so as to enable me to escape imprisonment in default cannot afford him a defence. What the position may be between me and the person who has paid or helped me to pay the fine is no concern of his.

The other matter arises over a claim for a small sum for expenses incurred over the removal. It appears that at some time in January the plaintiffs put workmen in to do some repairs in the expectation, no doubt, that they would become the occupiers. The loss has been occasioned because the justices disqualified the premises from being used as a club. But this disqualification was imposed in proceedings against the Danesbury Club. It may be that if the New Atlantic Club had not gone in before registration, the justices would not have disqualified the premises merely because the Danesbury Club had been in some trouble, about which I had no evidence, though I was told that there had been no conviction. But they might equally have done as they did in any case, and I cannot speculate on this subject. So it does not appear to me that it can be fairly said that this loss results from the defendant's negligence.

There will be judgment tor the plaintiffs for £84 and costs.

Solicitors: *Alexander Browne*, Grimsby (for the plaintiffs); *Wainwright, Woolfe & Co.*, Grimsby (for the defendant.)

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

PETERBOROUGH ROYAL FOXHOUND SHOW SOCIETY *v.* COMMISSIONERS OF INLAND REVENUE.

[KING'S BENCH DIVISION (Lawrence, J.), **March 20, 31, 1936.**]

Income tax—Exemption—Charity—Society to promote interests of foxhound breeding—Agricultural society—Income Tax Act, 1918 (*c.* 40), *s.* 37—*Finance Act*, 1921 (*c.* 32), *s.* 30—*Finance Act*, 1923 (*c.* 14), *s.* 11—*Finance Act*, 1924 (*c.* 21), *s.* 23—*Finance Act*, 1927 (*c.* 10), *s.* 24.

A society was formed to promote the interests of foxhound breeding in the United Kingdom and for that purpose to hold annually a foxhound show. The funds and income of the society, including the net proceeds of the show, were applied solely towards the promotion of the purposes of the society and no profits were in any event distributable among the members. The surplus assets in the event of a winding up were to be applied to a charitable purpose. The society was assessed in respect of the balance of its profits and gains and in respect of interest on War Loan. The society claimed exemption from income tax as a charity within the Income Tax Act, 1918, s. 37, and the Finance Act, 1921, s. 30, as amended by the Finance Act, 1927, s. 24, or alternatively as an agricultural society within the Finance Act, 1924, s. 23 from income tax in respect of profits from its shows :—

HELD : (i) the society was an agricultural society and exempt from income tax in respect of profits from its shows.

(ii) the society was not established for a purpose directly benefiting the community as a whole and was not therefore established "for charitable purposes only." It was not, therefore, exempt from income tax on the proceeds of its investments.

[**EDITORIAL NOTE.** It is one of the main essentials of a "charitable purpose" that it shall be both of public utility and directly beneficial to the community as a whole. The public utility requirement may be satisfied whilst the purpose is only of direct benefit to a small class of the community. In deciding who derives the benefit from the purpose, it is important to consider the constitution of the society and the object with which it was formed, as well as the practical results of its being carried on. In the present case it was thought that the main benefit from the operation of this society was confined to the comparatively small class who are concerned with foxhunting.

AS TO CHARITABLE PURPOSES IN RESPECT OF INCOME TAX, see HALSBURY, Hailsham Edn., Vol. 17, pp. 310-317, paras. 617-624; and FOR CASES, see DIGEST, Vol. 28, pp. 82-84, Nos. 469-483 ; The STATUTES referred to relating to INCOME TAX are included in HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 9 : Income Tax Act, 1918, s. 37, at p. 443 ; Finance Act, 1921, s. 30, as amended by Finance Act, 1927, s. 24, at p. 629 ; Finance Act, 1924, s. 23, at p. 656. The STATUTE relating to ENTERTAINMENTS DUTY, Finance Act, 1923, s. 11, is in Vol. 16, p. 914.]

Cases referred to :

(1) *Income Tax Special Purposes Commissioners* v. *Pemsel*, [1891] A.C. 531 ; 28 Digest 10, *51.*

(2) *Re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451 ; 8 Digest 296, *731.*

(3) *Re Nottage, Jones* v. *Palmer*, [1895] 2 Ch. 649 ; 8 Digest 265, *266.*

(4) *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society*, [1928] 1 K.B. 611 ; 13 Tax Cas. 58 ; Digest Supp.

(5) *General Medical Council* v. *Inland Revenue Commissioners, English Branch Council of General Medical Council* v. *Inland Revenue Commissioners* (1928), 13 Tax Cas. 819 ; Digest Supp.

(6) *A.-G.* v. *National Provincial & Union Bank of England*, [1924] A.C. 26 ; Digest Supp.

Case stated under the Finance Act, 1925, s. 19 (3) and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The Peterborough Royal Foxhound Show Society was formed to promote the interests of foxhound breeding in the United Kingdom and for that purpose to hold annually a foxhound show at which various prizes were awarded, and for admission to which an entrance fee was charged. The whole of the funds and income of the society, including the net proceeds arising from the foxhound show were applied solely towards the promotion of the purposes of the society, and upon a winding up of the society the surplus assets were to be applied to such charitable purpose as the committee should by resolution appoint. If and when a profit was made, such profit could not, under the rules of the society, be distributed among the members of the society for their own use and benefit.

The society were assessed under Sched. D. Upon appeal to the Special Commissioners, the society claimed as a charity exemption from income tax under the Income Tax Act, 1918, s. 37, and under the Finance Act, 1921, s. 30, as amended by the Finance Act, 1927, s. 24, and alternatively claimed exemption from income tax in respect of the profits arising from the show on the ground that it was an agricultural society within the meaning of the Finance Act, 1924, s. 23.

The Special Commissioners held (1) that the society was not a charity and (2) that it was not an agricultural society within the definition in the Finance Act, 1924, s. 23, and they dismissed the appeal.

The society appealed.

J. Millard Tucker, K.C., and *W. K. Carter* for the appellants.

The Attorney General (*Sir Donald Somervell, K.C.*), and *Reginald P. Hills* for the respondents.

Lawrence, J. : The first question I have to decide is whether the appellant society is exempt from income tax on the profits of its show by reason of the Finance Act, 1924, s. 23, which provides that profits arising to an agricultural society from a show held for the purposes of the society shall, if they are applied solely to the purposes of the society, be exempt from income tax, and defines an agricultural society as one established for the purpose of promoting the interests of agriculture, horticulture, live stock breeding, or forestry. By its constitution, the purpose of the appellant society is to promote the interests of foxhound breeding, and the only question on this branch of the appeal is whether foxhound breeding is live stock breeding within the meaning of the Finance Act, 1924, s. 23. In my opinion, it is. The words " live

stock " are ordinarily and properly used in contrast with dead stock and include all live animals and birds the breeding of which is regulated by man. In MURRAY'S, the only dictionary to which my attention was called, the words are defined as " domestic animals or animals kept for use or profit." They are defined in the Finance Act, 1923, s. 11, for the purpose of exempting live stock shows from entertainment duty, as including animals of any description, and they are used in a somewhat similar sense in the Agricultural Holdings Act, 1923, ss. 12 (6), 34, 35, 36, and 57.

It was contended for the Crown that the words ought to be construed, in view of their context, in accordance with the maxim *noscitur a sociis*, as referring only to animals whose use is an integral part of agriculture, horticulture or forestry. But such an interpretation would exclude many animals which are bred in the ordinary course of agriculture and shown throughout the country; for example, town, and van horses, hackneys, hunters, race horses, most breeds of dogs, and fur-bearing animals. I see no reason why the words should receive this limited interpretation, particularly as it was the will of the legislature that such societies should be exempted from entertainment duty.

The second question is whether the appellant society is exempted from income tax on the proceeds of its investments under the Finance Act, 1918, s. 37, on the ground that it is established for charitable purposes only. It was contended for the Crown, though but faintly, that the question is one of fact and that the commissioners' finding is binding upon me; but as I read the decisions upon this subject, it is for the commissioners to say what are the purposes of the society, and for the court to decide as a matter of law whether those purposes are charitable. The only finding of fact as to the object of this society is in para. 3 of the case, namely, that it is to promote the interests of foxhound breeding. The appellants seek to bring their society within the fourth category stated by LORD MACNAGHTEN in *Pemsel's* case (1) on the ground, *inter alia*, that fox hunting is good for the community at large because it keeps money in the country and brings it into the countryside, and also good for officers in the army and those who take part in it, and that it makes for the well-being of animals, which is for the benefit of the community. Though I am firmly convinced of the truth of these propositions of fact, I am unable to take the view that the appellant society is established for charitable purposes only. It has, I think, been authoritatively laid down that LORD MACNAGHTEN'S fourth category must be tested by reference to the subjects mentioned in the statute of Elizabeth itself; see *Re Macduff* (2) at page 464. Adopting this method of interpretation, I can see no satisfactory analogy between a foxhound show and the matters referred to in the statute of Elizabeth. The difficulty in this class of case arises principally from the mixture of

motives or purposes which appear to exist in the minds of the founders of such societies. A society may be established with an immediate direct but incidental motive or purpose which is not charitable; for example, to promote the sports of a particular regiment, but with an ultimate indirect but main purpose which is charitable, and in that case it comes within the exemption; see *Re Nottage* (3) at page 656; per Rowlatt, J., *Inland Revenue Commissioners. v. Yorkshire Agricultural Society* (4) at page 77; per Sargant, L.J., *General Medical Council* v. *Inland Revenue Commissioners* (5), at page 849; and per Lord Haldane in *A.-G* v. *National & Union Provincial Bank of Englnnd* (6), at page 267. Similarly, in the *Yorkshire Agricultural Society's* case (4), the benefit of members and, as I think, the hound show were incidental purposes, agriculture being the main purpose.

The question then, in my opinion, is whether the society's main or dominant purpose is charitable. In the present case I am of opinion that the main purpose of the appellant society's activities is to benefit fox hunting, not to benefit the community.

The case most favourable to the appellants' contention is the *Yorkshire Agricultural Society's* case (4). There agriculture was held to be the main purpose of the society and was considered to be directly beneficial to the community, whereas here, fox hunting cannot, in my opinion, be said to be directly beneficial to the community. At any rate, fox hunting is not, in my opinion, analogous to the subjects mentioned in the statute of Elizabeth, and I therefore hold that the appellant society is not established for charitable purposes only.

The appeal will be allowed in part with reference to the live stock breeding point.

No order for costs.

Solicitors: *Field, Roscoe & Co.*, agents for *Batten & Whitsed*, Peterborough (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

R. *v.* THE MINISTER OF HEALTH, *Ex parte* VILLIERS

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Goddard, JJ.), **March 23, 24, 31, 1936.**]

Public Health—Housing—Appropriation of land—Open space—London Open Spaces Act, 1893 (*c. lxxi*)—*Housing Act*, 1925 (*c.* 14), *ss.* 65, 103.

The London County Council in the exercise of their powers under the Housing Act, 1925, proposed to appropriate a portion of a certain open space, called Hackney Marshes, for building purposes. The court was moved to issue a writ of prohibition prohibiting the Minister of Health from: (*a*) consenting to such appropriation; (*b*) certifying under Housing Act, 1925, s. 103 (1) his approval of an exchange of such land for other land at Chigwell; and (*c*) holding a public local inquiry into these matters under sect. 103 (2) of that Act:—

HELD: under the London Open Spaces Act, 1893, Hackney Marshes were put in an exceptional position and could not be appropriated for housing, and this position was not altered by subsequent legislation. The writ of prohibition should therefore issue.

[**EDITORIAL NOTE.** The open space here in question was by the London Open Spaces Act, 1893, made a public open space in perpetuity, and the London County Council were ordered so to maintain it. When the Act of 1893 was passed, there was in force the Housing of the Working Classes Act, 1890, s. 57 (3), which allowed the appropriation of any land vested in a local authority for building purposes; but clearly this power could not apply to Hackney Marshes, in view of the express terms of the 1893 Act. The 1890 Act, after some intervening legislation, is now replaced by a consolidating Act, the Housing Act, 1925. The terms of the present enactment being substantially the same as those of the 1890 Act the court was forced to the conclusion that there is no power to appropriate in the way suggested.

AS TO ACQUISITION OF LAND FOR BUILDING PURPOSES, see HALSBURY, 1st Edn., Vol. 23, Public Health and Local Administration, p. 538, para. 1076; and FOR THE HOUSING ACT, 1925, ss. 65 and 103, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 13, pp. 1039 and 1059.]

Cases referred to:

(1) *R.* v. *Electricity Comrs., Ex p. London Electricity Joint Committee & Co. (1920), Ltd.*, [1924] 1 K.B. 171; 20 Digest 197, *1*.
(2) *Morisse* v. *Royal British Bank* (1856), 1 C.B.N.S. 67; 42 Digest 776, *2053*.
(3) *Garnett* v. *Bradley* (1878), 3 App. Cas. 944; 42 Digest 770, *1968*.
(4) *Re Smith's Estate, Clements* v. *Ward* (1887), 35 Ch. D. 589; 42 Digest 769, *1963*.
(5) *Blackpool Corporation* v. *Starr Estate Co.*, [1922] 1 A.C. 27; 42 Digest 770, *1974*.
(6) *Seward* v. *Vera Cruz (Owners), The "Vera Cruz"* (1884), 10 App. Cas. 59; 42 Digest 769, *1959*.
(7) *R.* v. *Minister of Health, Ex p. Davis*, [1929] 1 K.B. 619; Digest Supp.
(8) *Fitzgerald* v. *Champneys* (1861), 2 John. & H. 31; 42 Digest 769, *1960*.
(9) *London & Blackwall Railway Co.* v. *Limehouse District Board of Works* (1856), 3 K. & J. 123; 42 Digest 768, *1943*.
(10) *Stewart* v. *River Thames Conservators*, [1908] 1 K.B. 893; 42 Digest 781, *2112*.
(11) *Gilbert* v. *Gilbert & Boucher*, [1928] P. 1; 42 Digest 781, *2113*.

MOTION for a rule of prohibition prohibiting the Minister of Health from consenting to a scheme whereby it was intended to appropriate

a part of an open space called Hackney Marshes for housing purposes under the Housing Act, 1925.

The Attorney-General (Sir Donald Somervell, K.C.) and *Valentine Holmes* for the Minister of Health.

Sir William Jowitt, K.C., and *H. G. Robertson*, for the London County Council.

Sir Patrick Hastings, K.C., Trustram Eve, K.C., and *J. P. Ashworth*, for the applicant.

The Attorney-General (Sir Donald Somervell, K.C.): The Housing Act, 1925, gave general powers to appropriate open spaces. The applicants protest against the London County Council taking a part of the Hackney Marshes for housing purposes on the ground that the Council has no power to do so under the Housing Act, 1925, and even if it had, the proposals failed to comply with sect. 103 of that Act. It is a mistake to say that there ought to be an order by the London County Council under seal. Sect. 65 deals with the power to appropriate land and the consent is given by the order of the Minister. The procedure is not an order by the local authority for confirmation but an application for consent to be given by order. Sect. 103 deals with commons and open spaces. The order will be given by consent under sect. 65. It is provisional until there has been confirmation or provision of other land. If there are considerable open spaces in one part of a local authority's area and very little in another, it might be that part in one area should be increased and part in the other diminished. The only person who can authorise the exchange is the Minister. Under sect. 103 there must be an order authorising the appropriation, and under sect. 65 it must be by the Council with the consent of the Minister. Having regard to the words of the section, this case does go beyond the previous authorities in which prohibition has been granted. In *R.* v. *Electricity Commissioners* (1) the commissioners were bound to hold an inquiry. In the present case, the words are "shall if necessary." The Minister has to decide if it is necessary. By the Housing Act, 1925, s. 16, the Minister has a general power to cause an inquiry to be held if he thinks fit.

Sir William Jowitt, K.C.: The London County Council wish to have it determined whether they can appropriate for housing purposes part of Hackney Marshes. In this case, the land already belongs to the local authority and the Housing Act, 1925, sect. 65, applies when a local authority decides to appropriate its own land. It is suggested that the order under sect. 103 is the order made by the Minister when he confirms the scheme. If the Minister were of the opinion that the London County Council could discharge their duties without encroaching upon an open space, he would disallow the scheme. In some parts of London there is unsatisfactory housing overcrowding. It is considered necessary,

if it can legally be done, to appropriate these thirty acres. People can then be moved and their area dealt with. People cannot be turned out unless alternative provision is made for them as a matter of both law and common humanity. Hackney Marshes are not in a position different from the majority of open spaces in London. They are all given to the public in perpetuity by Act of Parliament. As the special Act gives special powers, so the Housing Act, 1925, added to those powers. The London County Council are bound to carry out their statutory obligations.

[He referred to *Garnett* v. *Bradley* (3); *Blackpool Corporation* v. *Starr Estate Co.* (5); *Seward* v. *Vera Cruz* (*Owners*) (6); *R.* v. *Minister of Health, Ex p. Davis* (7).]

Sir Patrick Hastings, K.C.: Under the Housing Act, 1925, s. 64, there is power to acquire land compulsorily. That is done by means of an order of the local authority submitted to the Minister. Under sect. 65 the local authority may, with the consent of the Minister, appropriate land at their disposal and there is no reference there to the word "order." When one comes to sect. 103, sect. 120 makes it quite clear that if an order is an order by a local authority, it **must** be under seal. If the acquisition is to be made by order, that order must be under seal. The order, therefore, under sect. 103 must be an order of the local authority for several reasons. Where any order under this Act authorises the acquisition or appropriation to any other purpose of any land, the order authorising the acquisition is an order of the local authority—that is by sect. 64. The order shall be provisional only and shall not be effective until confirmed by Parliament. Under sect. 65 there is appropriation by order, and all that is necessary is to obtain the consent of the Minister as the order, under sect. 65, requires the Minister's confirmation. He does not consent by an order but gives his certificate. The only order referred to in sect. 103 is an order which results in the acquisition or the appropriation of land.

The main point is one of great importance. It is agreed that a general Act does not overrule a special Act unless it is necessary for the purpose of the general Act that it should be read that way. There is no limitation of that doctrine. It is necessary to see if the Open Spaces Act, 1893, was a special Act. It is also necessary to see whether or not, under the interpretation of the Housing Act, 1925, the Act of 1893 was affected. The words of the Housing Act, 1925, are wide enough to cover the matters within its ambit, and its provisions are amply satisfied by matters not to be found in the Open Spaces Act, 1893. This is an Act which incorporated in its schedule two agreements of sale or compromise. The lands were known as Lammas lands, and held under a peculiar tenure. The persons who have the rights in them, up to a certain day called Lammas Day, have the right of sowing and reaping corn and other agricultural produce on the land, and the form of tenure is

akin to freehold. But after Lammas Day, the corns or other crops are supposed to have been garnered and the land becomes common grazing land and may be used as such by people who have not Lammas rights. The Open Spaces Act, 1893, was passed after the Housing Act, 1890, and therefore the Act of 1890 was present to the mind of the Legislature. The Act of 1893, which deals with this remarkable tenure, is an Act to confer powers upon the London County Council with regard to Hackney Marshes. By sect. 12, the council were given power to exchange any of the land for any land adjoining. Adjoining does not mean adjacent, but contiguous, and nothing else. Land in the Hackney Marshes could not be exchanged for land which is not actually contiguous and touching. The whole scheme was that the people who surrendered their rights and subscribed their money did so that a space of that size should never be less, and the Act expressly provides that if the local authority desires to deal with any portion of the land, they must give other land adjoining that it can never be less at any time. The Housing Act, 1925, is an Act to consolidate the enactments relating to housing and anything which comes between the original Act and the consolidating Act must not be considered as repealed. The Act of 1893 is a special Act with very peculiar enactments and very peculiar restrictions both as to the terms of payment which are conditional upon other people supplying the funds and upon various matters, including the restrictive protection that no land could be exchanged for this land unless it was adjoining. [He referred to : *Seward* v. *Vera Cruz* (*Owners*) (6) ; *Blackpool Corporation* v. *Starr Estate Co.* (5) ; *Garnett* v. *Bradley* (3) ; *Fitzgerald* v. *Champneys* (8) ; *Re Smith's Estate* (4) ; *London & Blackwall Railway Company* v. *Limehouse District Board of Works* (9) ; *Stewart* v. *River Thames Conservators* (10) ; *Morisse* v. *Royal British Bank* (2) ; *Gilbert* v. *Gilbert & Boucher* (11).]

Trustram Eve, K.C. : It is said that although in 1893 Parliament may have been dealing with a particular subject, there are also in London a number of public spaces in their nature similar and therefore Parliament must have meant to deal with all public spaces in London. A convenient test of that type of argument can be obtained from *Blackpool Corporation* v. *Starr* (5). The duty imposed upon any housing authority is to provide houses upon land which they may lawfully use for that purpose. That obligation can only be exercised on certain land and certain spaces. The local authority cannot build upon land upon which it is not lawful to build.

Lord Hewart, L.C.J. : In this case Sir Patrick Hastings obtained a rule *nisi* calling upon the Minister of Health to show cause why a writ of prohibition should not be issued prohibiting him from (*a*) consenting to the appropriation by the London County Council of a portion of Hackney Marshes ; and (*b*) issuing his certificate under the Housing

Act, 1925, s. 103 (1), approving the giving in exchange of an area of land in the Hackney Marshes for an area of land at Chigwell; and (*c*) holding a public local enquiry under the Housing Act, 1925, s. 103 (2).

The facts are that by a local Act entitled the London Open Spaces Act, 1893, Hackney Marshes were vested absolutely in the London County Council in fee, freed from all rights, titles and interests whatsoever as an open space for the perpetual use thereof by the public for exercise and recreation and were to be maintained and preserved by the Council as such accordingly. The Act contained a provision (sect. 12) that the Council might from time to time by agreement exchange any lands forming part of the Marshes for any other lands adjoining, which the Council might think it desirable to substitute for any of the first-mentioned lands. It appears from the preamble to the Act and the agreements scheduled thereto that the lands were what are known as Lammas lands, forming part of the Manor of Lords Hold Hackney, and were bought from Lord Amherst and his trustee, who were the owners in fee, by the Council out of money provided as to half by subscriptions and as to the other half by the Council, the commoners receiving also a sum of money for the surrender of their rights. The Marshes have since been used as playing fields and no charge is made for the use of the 30 acres which form the subject matter of the present proceedings. This area is used by the poorer members of the public, including boys from the Eton Manor Club, for games and recreation, and the rule was obtained at the instance of Mr. Villiers, one of the managers of that club, who desires to preserve the open space.

In July, 1935, the Council determined to apply to the Minister of Health for his consent to their appropriating the thirty acres referred to for a housing scheme, offering in exchange some land at Chigwell which, however, is some seven miles from Hackney. In making this application, the Council acted with great reluctance and selected the Marshes for their housing site only because of the impossibility of finding another alternative site in the neighbourhood on which to build. The principal question for determination is whether the Housing Act, 1925, permits this course to be taken, in spite of the obligation imposed upon the Council by the Act of 1893 to maintain the Marshes as an open space. In showing cause for the Minister, the Attorney-General left this question for argument by counsel for the London County Council, and dealt only with two subsidiary matters. His first contention was that this case went beyond previous cases where it has been held that prohibition would lie to a Minister or a government department. The court, however, is of opinion that the case comes exactly within the judgment of the Court of Appeal in the case of *R.* v. *Electricity Commissioners* (1), and is indistinguishable in principle from that case. The Minister is proposing to hold an inquiry and to determine rights. If, as was pointed out, these proceedings establish that the Minister was exceeding his jurisdic-

tion by entertaining matters which might result in his decision being quashed by *certiorari*, prohibition would lie.

The other matter, dealt with by the Attorney-General, may be very shortly disposed of. One of the grounds on which the rule was moved was that the resolution of the County Council was not an order within the meaning of the Act of 1925, in that if was not under seal, and consequently there was no jurisdiction to grant a certificate under sect. 103 (1). But as the Attorney-General contended there is no need for the London County Council to make any order when they are proceeding under sect. 65 of the Act, which is the section dealing with the appropriation of their own lands by a local authority for housing purposes. We agree with him that this is not a point which will avail the applicant for the writ.

We now come to the principal question in the case. It is whether the general statute—the Housing Act, 1925—affects or alters the local statute—the London Open Spaces Act, 1893—so as to enable the County Council to appropriate part of Hackney Marshes for building, giving in exchange the land at Chigwell. The Act of 1925 is, as its title shows, a consolidating Act. It repeals with one immaterial exception the whole of the Housing of the Working Classes Act, 1890, and also parts I and IV of the Housing, Town Planning, etc., Act, 1909, so far as it relates to housing and not to town planning. It also repeals in whole or in part various other acts relating to housing which are immaterial to this Act. The provisions of the repealed Acts are re-enacted practically verbatim. Sect. 65 of the 1925 Act, under which the County Council claims to be entitled to appropriate the lands corresponds exactly, save for certain necessary verbal alterations due to subsequent legislation, with sect. 57 (3) of the Act of 1890. Sect. 103 of the Act of 1925 is taken bodily from the Housing, Town Planning, etc., Act, 1909, s. 73. Now, it cannot be seriously contended, nor did Sir William Jowitt attempt to argue that when Parliament passed the local Act of 1893 constituting Hackney Marshes as a public open space in perpetuity and directing the Council so as to maintain it, it was intended that the Council should at the same time have power to appropriate it to housing purposes. It seems obvious that it was intended to put Hackney Marshes in an exceptional position by contrast with other land vested in the Council which they could, if they desired, appropriate for housing. Sect. 73 of the Act of 1909 is complementary to sect. 57 of the Act of 1890. It provides for the procedure to be followed when, under the Act of 1890, the Council desire to acquire or appropriate for any other purpose land forming a part of a common or open space. If, therefore, sect. 57 (3) of the Act of 1890 did not apply to Hackney Marshes because of the Act of 1893, neither did sect. 103 of the Act of 1900. It is our opinion that when these Acts were repealed and re-enacted by a consolidating Act, the

position remained exactly as it was before the consolidating Act was passed. A statute which repeals and re-enacts the provisions of an earlier Act cannot have the effect of repealing an intermediate enactment. (See *Morisse* v. *Royal British Bank* (2).)

While this conclusion would be enough to dispose of the contention put forward by the London County Council, we think we ought also to refer shortly to another contention which was fully argued on both sides. Sir Patrick Hastings contended that the Act of 1893 is a special Act, that is, an Act dealing with a specific subject matter in a particular way, and accordingly is not to be deemed to be affected by a subsequent general Act unless such an intention is specifically declared in accordance with the well-known maxim *generalia specialibus non derogant.* Sir William Jowitt's answer is that the Act is not a special Act, in that it does not protect the rights of individuals or a class of individuals, but only the rights of the public, and he relied particularly on the speech of LORD BLACKBURN in *Garnett* v. *Bradley* (3). His argument is that under the Act of 1893 the Council were given power to exchange the lands for others adjoining, and therefore all that the Act of 1925 does is to widen that power and allow an exchange for any lands, provided that the original land is to be used for housing and the exchange has the consent of the Minister. The maxim to which we have referred has been the subject of an almost bewildering mass of authority, and no doubt the reasons given in support of it have differed somewhat in expression from time to time, probably because more reasons than one can be given. In our judgment, the true grounds were stated by STIRLING, J., in *Re Smith's Estate* (4), where he says at page 595 :

> Where there is an Act of Parliament which deals in a special way with a particular subject-matter, and that is followed by a general Act which deals in a general way with the subject-matter of the previous legislation, the court ought not to hold that general words in such a general Act of Parliament effect a repeal of the prior and special legislation unless it can find some reference in the general Act to the prior and special legislation.

If express words are absent, there must at least be necessary implication. To the same effect is the speech of LORD HALDANE in *Blackpool Corporation* v. *Starr Estate Co.* (5). Here we have a special subject-matter, and one, moreover, of a peculiar kind, namely, Lammas lands. To these lands the various Open Spaces Acts do not apply, and it is at least doubtful whether the Metropolitan Commons Act, 1866, applies to them. If it does apply, the procedure under that Act entails the passing of a special confirming Act. The subject-matter is also dealt with not in a special but in a quite peculiar way. Under sect. 12, the right to exchange for "adjoining" land is given and the lands taken in exchange are to be deemed part of Hackney Marshes, and are so to be held by the Council. We can find nothing in the Act of 1925 that in-

dicates any intention on the part of Parliament to effect so radical a change in the Act of 1893 as to permit the Council to build on a part of Hackney Marshes in exchange for lands so far as seven miles away, at Chigwell, and to deprive Hackney of an open space while providing one for a part of the population entirely different from that which now enjoys the advantages of Hackney Marshes. While we recognise the difficulty which confronts the London County Council in finding space on which to re-house that part of the population of East London whose present dwellings are unsatisfactory, and it may be deplorable, we are bound to hold that existing statutes do not permit them to make use of Hackney Marshes for this purpose. Accordingly the rule will be made absolute and a writ of prohibition must issue.

The judgment which I have just read is the unanimous judgment of this court.

The court ordered the costs to be paid, half by the Ministry and half by the London County Council.

Solicitors: *The Solicitor to the Ministry of Health; J. R. Howard Roberts*, Solicitor to the London County Council; *Slaughter & May* (for the applicant).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

HOLLYWOOD SILVER FOX FARM, LIMITED *v.* EMMETT.

[KING'S BENCH DIVISION (Macnaghten, J.), **March 19, 20, April 8, 1936.**]

Nuisance—Acts done on own land—Unreasonable acts—Motive—Firing gun on edge of property.

The plaintiffs were breeders of silver foxes. The defendant, thinking a certain notice-board advertising the plaintiffs' farm was detrimental to his own property, asked the plaintiffs to remove it. The plaintiffs refused, and the defendant thereupon instructed his son on several occasions during the breeding season to fire bird-scaring cartridges at a point on the defendant's land as near as possible to the breeding pens. As a result of such firing one vixen would not mate and another devoured her cubs. The plaintiffs brought an action for damages for nuisance and for an injunction :—

HELD : the firing, though done on the defendant's own land, was a nuisance for which the defendant was liable in damages and an injunction was granted restraining him from discharging guns or making other noises during the breeding season.

[**EDITORIAL NOTE.** The circumstances of this case appear to bring into conflict certain principles of the law of nuisance. The first is the law laid down in the well-known case of *Bradford Corpn.* v. *Pickles*, [1895] A.C.587, 36 Digest 164, *65*, where it was held that, provided an act is lawful, it does not become unlawful because the doer is actuated by motives of malice or the like. This must, however, be qualified by the principle that what is done must be done in the ordinary user of property, and therefore as stated in HALSBURY, 1st Edn., Vol. 21, p. 509, para. 851. An act which is in ordinary circumstances innocent may, under particular conditions, become an actionable nuisance." Circumstances to be considered are "the time of the commission of the act ; the place of its commission, the manner of committing it, whether done wantonly or in the reasonable exercise of rights." These words are particularly applicable to the circumstances of this case.

AS TO WRONGFUL ACTS, see HALSBURY, 1st Edn., Vol. 21, Nuisance, pp. 509, 510, paras. 851, 852, and FOR CASES, see DIGEST, Vol. 36, pp. 160, 161, Nos. 32-37, and p. 164, Nos. 62-65.]

Cases referred to :

(1) *Keeble* v. *Hickeringill* (1706), 11 East. 574 ; 11 Mod. Rep. 74, 130 ; 25 Digest 364, *127*.
(2) *Bradford Corpn.* v. *Pickles*, [1895] A.C. 587 ; 36 Digest 164, *65*.
(3) *Allen* v. *Flood*, [1898] A.C. 1 ; 42 Digest 972, *35*.
(4) *Robinson* v. *Kilvert* (1889), 41 Ch.D. 88 ; 36 Digest 195, *357*.
(5) *Eastern & South African Telegraph Co.* v. *Cape Town Tramways Cos.*, [1902] A.C. 381 ; 36 Digest 188, *313*.
(6) *Gaunt* v. *Fynney* (1872), 8 Ch. App. 8 ; 36 Digest 167, *83*.
(7) *Christie* v. *Davey*, [1893] 1 Ch. 316 ; 36 Digest 195, *360*.
(8) *Ibbotson* v. *Peat* (1865), 3 H. & C. 644 ; 36 Digest 217, *599*.

ACTION to recover damages for injury caused by noise and for an injunction to restrain the repetition of such noise.

J. P. Eddy, K.C., and *M. P. Picard*, for the plaintiffs.

T. G. Roche, for the defendant.

Macnaghten, J.: In this action tried before me, without a jury, it was sought by the plaintiffs, Hollywood Silver Fox Farm, Ltd., to recover damages by reason of noise and for an injunction. It raises once again the interesting question whether an opinion attributed to Holt, C.J., in one of the reports of a case heard by the famous judge, viz., *Keeble* v. *Hickeringill* (1), is in accordance with the common law of England. I accordingly took time to consider my decision.

The facts which have given rise to the claim in this case are as follows: In Sept., 1934, a Captain Chalmers was minded to start business as a breeder of silver foxes for profit, and with that object in view, he purchased some 20 acres of land and Hollywood Cottage, at Kingsdown, in the county of Kent. He made a number of pens in which to keep the foxes. He had 13 vixens and 12 foxes. The property acquired by Captain Chalmers is bounded on the north by School Lane and he erected on the land adjacent to School Lane a board inscribed with the words "Hollywood Silver Fox Farm." The defendant is the owner of a large farm on the north-east side of Captain Chalmers' fox farm. The pens erected for the silver foxes are some 29 yards from the boundary of the defendant's land. It so happened that when Captain Chalmers started his farm, the defendant was about to develop his adjoining field as a small building estate and he laid down a private road in the middle of the field and divided the adjoining land into plots for bungalows. The notice board was placed in such a position as to be visible not only from School Lane, but also from the defendant's field, and the defendant thought that the notice board was detrimental to his scheme in that it would prevent people from buying his plots. He asked Captain Chalmers to remove the notice. Captain Chalmers said he could see no reason for so doing. A few days later, the defendant called again and repeated the request which was again refused. On another occasion, he said that if the notice board was not removed, he would shoot with black powder, as near as he could get to the breeding pens and he said "You will not raise a single cub." The defendant admitted calling upon Captain Chalmers at Hollywood Cottage and asking for the removal of the notice board, but denied that he said that he would fire. I am satisfied that the evidence of Captain Chalmers is true and that the defendant did make threats. In consequence of the threats, Captain Chalmers' solicitors wrote to the defendant and the defendant did not reply. In the following month, the Hollywood Silver Fox Farm was converted into a company limited by shares. It was given in evidence that silver foxes breed once a year, between the months of January and May, and during the breeding season the vixens are extremely nervous. Any noise—such as the discharge of powder—is likely to have an injurious effect upon them. Such noises may put a vixen off her mating, or may cause her to kill and devour her young. In Apr., 1935, the

defendant carried out his threat. He sent his son to discharge a 12-bore gun, loaded with black powder, near the pens where the foxes were kept. It was on Tuesday, Apr. 23, when this occurred for the first time. Captain Chalmers heard a shot which might have disturbed the vixens. On the three following evenings, the young man again came to the boundary and again fired the gun. On the last occasion, the defendant himself was present and he asked Captain Chalmers if he intended to remove the notice board, saying that he was acquainted with the law and that he had a right to shoot on his own land. On Apr. 24 Captain Chalmers wrote, through his solicitors, demanding the ceasing of the shooting and the defendant replied that the shooting was for the purpose of killing rabbits. Captain Chalmers applied for an injunction to restrain the defendant from committing a nuisance by shooting within 100 yards of the plaintiff's land.

At the trial the defendant gave evidence. He said that his property was overrun by rabbits and he instructed his son to shoot there for the purpose of keeping down the rabbits and his evidence was supported by his son. Other witnesses were called to show that the rabbits were very numerous and other witnesses were called for the plaintiff's side, who said they were very scarce. The witnesses called for the plaintiffs were, in my opinion, more credible than those called for the defendant. I am satisfied that the defendant shot, not for the purpose of killing rabbits, but for the purpose of frightening the vixens and for no other purpose at all. It appears that cartridges called bird-scaring cartridges were used by the young man, and that a companion threw a tin up in the air and he shot at the tin in the air. The evidence that the shooting was for the purpose of keeping down rabbits was manifestly untrue. In my opinion, the shooting greatly alarmed the vixens, and I am satisfied that the plaintiff sustained serious loss thereby, but it is difficult to measure this loss in money. The plaintiff had 13 vixens and there were as a general rule an average of two cubs from each vixen. One vixen was put off mating for that season and there was other loss, and I accept Captain Chalmers' evidence with regard to these matters.

Mr. Roche, who put the case for the defendant extremely well, argued that if the defendant had sent his son to shoot at the boundary of his land for the purpose of injuring the plaintiff and that if his conduct was malicious because he wanted to harm the plaintiff, nevertheless he had not committed any actionable wrong. The defendant was entitled to shoot on his own land. He might shoot there to keep down rabbits, or he might shoot for his own pleasure and if it pleased him to annoy his neighbour, although his conduct might be considered unneighbourly, he was entitled at law to do so. In the course of his argument, Mr. Roche relied upon the decision of the House of Lords in the case of *Bradford Corpn.* v. *Pickles* (2). In that case the Corporation of Bradford sought

an injunction to restrain the defendant from sinking a shaft on land which belonged to him because, according to their view, his object in sinking the shaft was to draw away water which would otherwise become the property of the Corporation Pickles was acting maliciously. His sole object in digging was to do harm to the Corporation. The House of Lords decided, once and for all, that in such a case the motive of the defendant is immaterial. In *Allen* v. *Flood* (3), Lord Herschell, commenting on in *Bradford Corpn.* v. *Pickles* (2), said this, at page 124 :

> It has recently been held in this House, in the case of *Bradford Corpn.* v. *Pickles* (2), that acts by the defendant upon his own land were not actionable when they were within his legal rights, even though his motive were to prejudice his neighbour. The language of the noble and learned Lords was distinct. The Lord Chancellor said "This is not a case where the state of mind of the person doing the act can affect the right. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good the motive might be, he would have no right to do it." The statement was confined to the class of cases then before the House; but I apprehend that what was said is not applicable only to rights of property, but is equally applicable to the exercise by an individual of his other rights.

In the same case Lord Watson, at page 101, discussing the duck-decoying case of *Keeble* v. *Hickeringill* (1), said this :

> No proprietor has an absolute right to create noises upon his own land, because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public. If he violates that condition he commits a legal wrong, and if he does so intentionally, he is guilty of a malicious wrong, in its strict legal sense.

Mr. Roche contended that in this case the defendant had committed no nuisance at all in the legal sense of this case and he referred to *Robinson* v. *Kilvert* (4). In that case complaint was made by the appellant that the brown paper which he kept on the ground floor of his premises suffered some damage from heat in the basement below, and it was held by the Court of Appeal that no actionable wrong was being committed by the defendant in that the heating was not of such a character as would interfere with the ordinary use of the rest of the house. He supplemented the argument, based on the consideration of that case, with the observations of Lord Robertson in *Eastern & South African Telegraph Co.* v. *Cape Town Tramways Cos.*, (5), where Lord Robertson, delivering the judgment of the Privy Council, said, at page 393 :

> A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure.

It was argued that the keeping of a silver fox farm was not an ordinary use of land in the county of Kent, and what the defendant had done in discharging the bird-scaring cartridges would cause no alarm to the sheep or cattle which are usually to be found on Kentish farms. It was

only because Captain Chalmers had brought these highly nervous animals —not natural to this country—that had caused the plaintiffs any loss and if silver foxes were brought to the county of Kent, one could not thereby restrict their neighbours in the matter of shooting. I am not satisfied that there is any substance in that argument. It is a perfectly lawful thing to keep a silver fox farm and I think the fact that the shooting took place intentionally for the purpose of injuring the plaintiffs made it actionable.

The authority for the view that in cases of alleged nuisance by noise, the intention of the person making the noise is not to be disregarded is to be found in the case of *Gaunt* v. *Fynney* (6). LORD SELBORNE, L. C., delivered the judgment of the court, and he was dealing there with the question of nuisances, and he said this, at page 12 :

> A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree.

It has been observed by high authority that LORD SELBORNE was always extremely careful in the use of language and that parenthetical statement "supposing malice to be out of the question" clearly indicates what his Lordship thought in the case of alleged nuisance by noise, where the noise was made maliciously. Different considerations would apply to cases where that ingredient was absent. Indeed, the matter is put beyond doubt by the decision of NORTH, J., in *Christie* v. *Davey* (7). The plaintiff and the defendant lived side by side in semi-detached houses in Brixton. The plaintiff was a teacher of music and he had a musical family. The result was that throughout clouds of music pervaded his house and were heard in the house of his neighbour. His neighbour did not like music to be heard and after writing rather an unfortunate letter of protest, he took to making noises himself by beating trays and rapping on the wall, and thereupon the music teacher brought an action for an injunction. The action came before NORTH, J., and he delivered judgment in favour of the plaintiff and granted an injunction restraining the defendant from permitting any sounds or noises in his house so as to annoy the plaintiff or the occupiers of his house, and in the course of his judgment he said, at page 326 :

> The result is that I think I am bound to interfere for the protection of the plaintiffs. In my opinion the noises which were made in the defendant's house were not of a legitimate kind. They were what, to use the language of LORD SELBORNE in *Gaunt* v. *Fynney* (6) "ought to be regarded as excessive and unreasonable." I am satisfied that they were made deliberately and maliciously for the purpose of annoying the plaintiffs. If what has taken place had occurred between two sets of persons, both perfectly innocent, I should have taken an entirely different view of the case. But I am persuaded that what was done by the defendant was done only for the purpose of annoyance, and in my opinion it was not a legitimate use of the defendant's house to use it for the purpose of vexing and annoying his neighbours.

It must be borne in mind that the learned judge could not grant an injunction unless he was satisfied that the nuisance at law had been created because there is no such thing as an equitable nuisance. It is to be observed that the judge was of the opinion that the noises were made intentionally for the purpose of annoying the plaintiff and this was the deciding matter in that case.

In the case of *Ibbotson* v. *Peat* (8), a precedent for the statement of claim in this action is to be found. Mr. Ibbotson was a land-owner at Brampton in the county of Derby and his land adjoined a grouse moor belonging to the Duke of Rutland. Mr. Ibbotson, for the purpose of inducing the grouse on the Duke of Rutland's land to come on to his own, put on his own land quantities of corn on which grouse feed and thereby lured and enticed the grouse to come away from the Duke's land. The defendant Peat was in the employ of the Duke of Rutland and, minded to prevent Mr. Ibbotson, the plaintiff, from getting advantage from such ungentlemanly conduct, let off fireworks, rockets and bombs, as near as he could get to Mr. Ibbotson's land, for the purpose of frightening the grouse attracted by the corn away back to the Duke's land. In answer to the claim in that case, the defendant said, by a plea, that he was justified in letting off the rockets and bombs, because of the improper conduct of the defendant in luring away the grouse. The question was whether that was a good plea. It was decided that it was not a good plea. But, at the same time, the court expressed the opinion that the declaration alleging nuisance by noise intentionally made for the purpose of injuring the plaintiff was a good cause of action and if no plea were filed judgment would necessarily be entered for the plaintiff.

To come back to the opinion expressed by Holt, C.J., in *Keeble* v. *Hickeringill* (1). Mr. Keble was the owner of land on which he had a duck decoy. He brought an action on the case against Mr. Hickeringill for scaring wild ducks from his decoy. The counsel for the defendant said that the question before the court was whether the action lay. The action came before the court first in the Easter term. The Chief Justice was not satisfied about the case and it was further considered in the Trinity term and judgment was entered for the plaintiff, the court holding that the action lay. It was brought on the case as argued in the Easter term and these words are attributed to Holt, C.J. There was on the declaration a question as to whether it would be right to infer that the defendant had actually trespassed on the plaintiff's land and Holt, C.J. said this (11 Mod. Rep. at page 75) :

> But suppose the defendant had shot in his own ground, if he had had occasion to shoot, it would have been one thing ; but to shoot on purpose to damage the plaintiff is another thing, and a wrong.

In my opinion, the authorities to which I have referred support the view

that a person who shoots on his own land, or makes other noises on his own land, for the purpose of annoying or injuring his neighbour, does, by the common law, commit the actionable wrong of nuisance for which he is liable in damages at common law and was liable to be restrained by an injunction in a court of equity before the Judicature Act. I think that the plaintiff is entitled to maintain this action and he has established the cause of action which he alleged. It was suggested by Mr. Roche that the action was not maintainable unless the plaintiff could prove actual damage. I do not think that is so. When once a nuisance at law is established, a plaintiff would be entitled to nominal damages. In this case, I am satisfied that the plaintiff has suffered actual damage. It is difficult to measure the damages in money, even with the particulars which the plaintiff gave of special damage. There was one of the vixens which, by reason of the shooting, did not mate at all, and another vixen had four cubs and devoured them herself. I accept this evidence of the plaintiff with regard to the matter. There was a great deal of difference between the witnesses called by the plaintiffs as to the value of the skins of the foxes, and the evidence called on behalf of the defendant. On the whole, I accept the evidence given by the plaintiffs. It was said by Mr. Roche that even if all the vixens had mated, it did not follow that they would have successfully reared the cubs and if the cubs which the vixen ate had been spared, it did not necessarily follow that they would have grown up and been profitable to the plaintiffs. I assess the damages at £250. I think also the court ought to grant an injunction and the injunction, I think, should be to restrain the defendant from committing a nuisance by the discharge of firearms or from making other noises in the vicinity of the Hollywood Silver Fox Farm so as to alarm or disturb the foxes kept by the plaintiffs at the said farm or otherwise to injure them.

There will be judgment for the plaintiffs for £250 damages and an order for an injunction in the form which I have suggested. It will be limited to the breeding season, namely, between Jan. 1, and June 30. The plaintiffs to have the costs of this action.

Solicitors : *Chas. J. Odhams & Sons* (for the plaintiffs) ; *A. J. Larcombe* (for the defendant).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

SHEARS *v.* WELLS.

[Chancery Division (Luxmoore, J.), **March 27, 31, April 1, 2, 3, 6 and 8, 1936.**]

Landlord and Tenant—Grant of lease—Tenant precluded from inquiring into lessor's title—Notice of restrictive covenants—Law of Property Act, 1925 (c.20) *s.* 44 (2) (5).

The first defendant's property was, under a deed of 1852, subject to a restrictive covenant running with the land, forbidding the owner or owners thereof for the time being from carrying on or making or permitting or suffering to be carried on or to be made upon the said property or any part thereof any trade, business, process or deposit which should be noisy, noxious, dangerous or offensive to the neighbourhood, or to the owners or occupiers of any of the land delineated on a specified plan. The second defendant was a tenant of the first defendant and it was alleged that by carrying on a garage and motor-repairing business, such second defendant was liable for a breach of the covenant :—

Held : under the Law of Property Act, 1925, s. 44 (5) the onus was upon the plaintiff to show that the second defendant had notice of the covenant in question and such notice not being proved, the second defendant was not liable for any breach of the covenant.

[**EDITORIAL NOTE.** The main contest in this case was upon a question of fact whether certain stables and a motor garage were in fact a nuisance and a breach of a covenant not to carry on a noisy or offensive trade upon the premises. It is only reported on an incidental point. The second defendant, being a tenant whose tenancy commenced after 1925, pleaded that, as he was precluded by the Law of Property Act, 1925, s. 44 (2) from inquiring into the title of the reversion of his lessor, he had no notice of the restrictive covenant, and was protected by sect. 44 (5). The importance of the case is the holding that it is incumbent upon a plaintiff to prove affirmatively that such a defendant had notice of the covenant. Subsect. (5) reversed the previous law as laid down in *Patman* v. *Harland* (1881), 17 Ch.D. 353 and, as the plaintiff will usually be a stranger to the contract of leasing, he will seldom be in a position to give any affirmative evidence of notice. On the other hand, if the restrictive covenant is registered as a land charge under the Land Charges Act, 1925, it would seem that the defendant will have notice of it in any event as such registration is notice to all the world.

As to Notice Upon Enquiry into Title Upon the Grant or Assignment of a Lease, see HALSBURY, Hailsham Edn., Vol. 20, p. 56, para. 56, and for the Cases Upon the Earlier Law, see Digest, Vol. 30, pp. 396, 397, Nos. 593-602. For the Law of Property Act, 1925, s. 44, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 15, p. 221.]

Action for a declaration that a certain covenant in a deed, dated June 28, 1852, was subsisting and binding upon the defendants and each of them, and an injunction restraining them from permitting a breach thereof. The plaintiff also alleged that the defendants were committing a common law nuisance and asked for an injunction in respect thereof. The plaintiff also claimed damages under both heads.

The covenant was in the following terms :

> And further that he or she (the said covenanting parties or party) will not and that his or her appointees assigns or heirs or any person or persons claiming or to

claim through under or in trust for them him or her or by their his or her acts or default shall not at any time hereafter carry on or make or permit or suffer to be carried on or made upon the lot or lots of the said building so vested in or purchased by them him or her (the said covenanting parties or party) as aforesaid or any part thereof any trade business process or deposit which shall be noisy noxious dangerous or offensive to the neighbourhood or to the owners or occupiers or owner or occupier of any of the said land delineated in the said plan or in any way injurious to the said land or any part thereof.

The facts are fully stated in the judgment.

Campbell Lloyd Davies and *A. N. Buckmaster*, for the plaintiff.

Harold Christie, K.C., and *T. K. Wigan*, for the first defendant, Wells.

J. G. Strangman and *K. L. Coglan* for the second defendant, Cooper.

LUXMOORE, J.: The plaintiff is the owner of two houses in Union Road, Walthamstow, known respectively as Nos. 20 and 22, Union Road. One of these, No. 22, she occupies, together with her son and his wife. The defendant Wells owns No. 24, Union Road, which is next door, and also No. 26. He also owns the land next to No. 26 and on this was erected in 1923 a garage. At the rear of Nos. 24 and 26 and of the garage is a large yard which the defendant Wells used for the purposes of his business of coal merchant and contractor, which he carried on at No. 15, Queens Road, Walthamstow, and he uses the stables in the yard for the horses which he employs in his business as coal merchant and contractor. In 1931 the defendant Wells let the garage to the defendant Cooper and at the time of the issue of the writ in this action Cooper was in occupation of the garage carrying on the business of a motor repairer. The plaintiff issued the writ on July 12, 1935, against both Wells and Cooper, and by it he claimed a declaration that certain covenants contained in a deed of covenant dated June 28, 1852, were subsisting and binding upon the defendants or each of them severally, and an injunction restraining them from permitting a breach of the covenants on the premises. The plaintiff also claimed that each of the defendants was committing a common law nuisance and claimed the appropriate injunction and damages for breach of covenant and for nuisance. It is admitted by the defendant Wells that the covenant is binding upon him, but he denies any breach of it. The defendant Cooper says that the covenant was not binding upon him, and each of them denies the nuisance. The plaintiff's and the defendants' property form part of an estate known as Walthamstow Estate No. 2. This estate is shown on the plan annexed to the deed, the plaintiff's property forming plot 27 and the defendants' 36 and 37. The plan shows that a fence was to be erected between lots 36 and 37 by the owner of 36, and the material covenant reads: [His Lordship read the covenant].

The covenant is so framed as to bind successors in title and to run with the land. There is an odd power of re-entry in the event of any breach, but nothing turns upon that in the present action. To fall

within the covenant the business must be noisy, noxious, dangerous or offensive. It is agreed that the two words " noxious " and " dangerous " have no bearing in the present instance. As for the word " noisy," that covers a trade which is noisy *per se* or, if not noisy *per se*, carried on in such a manner as to be sufficiently noisy to interfere with the reasonable comfort and enjoyment of the other owners of the estate. In the same way " offensive " refers to a business which is offensive *per se*, otherwise than by noise, for example by a bad smell, or so carried on as to be offensive to the reasonable comfort and enjoyment of the other owners in the estate.

The two businesses complained of are Wells' stables and the work done in the garage by Cooper. It was admitted by Mr. Lloyd Davies for the plaintiff, that neither business was necessarily noisy or offensive within the covenant and that the plaintiff must satisfy the court that the stables are so conducted as to constitute a nuisance by noise or smell or both and the garage so conducted as to form a nuisance. It follows that the plaintiff cannot succeed upon the covenant unless the court is so satisfied. I think that Cooper is not liable under the covenant at all. He took the tenancy of the garage in 1929 after the passing of the Law of Property Act, 1925. Sect. 44 enacts as follows :—

(2) Under a contract to grant or assign a term of years, whether derived or to be derived out of freehold or leasehold land, the intended lessee or assign shall not be entitled to call for the title to the freehold.

(4) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

(5) Where by reason of any of the three last preceding subsections, an intending lessee or assign is not entitled to call for the title to the freehold or a leasehold reversion, as the case may be, he shall not, where the contract is made after the commencement of this Act, be deemed to be affected with notice of any matter or thing of which, if he had contracted that such title should be furnished, he might have had notice.

It follows that the onus of proving that the defendant Cooper had notice when he took the tenancy is on the plaintiff. There is no evidence here that he had notice and the onus is not discharged. The defendant Cooper is therefore not subject to the covenants in the deed. As for Wells, it may be that he is liable both for the stables and for the defendant Cooper as far as the yard is concerned, for although this was not included in the tenancy agreement he has permitted him to use the yard in connection with his garage business. If Cooper has committed a nuisance by carrying on this business in the yard, I think that Wells is liable under the covenant. It is necessary to consider each case separately.

[His Lordship reviewed the evidence.] The result is that the action against Wells with regard to the stables and the yard fails. The action

is dismissed and the plaintiff must pay the costs. With regard to the costs of the complaint against the second defendant, Cooper, of the noises and the claim that Wells is liable under the covenant for permitting this, the plaintiff will get costs of these two, together with the proper proportion of the costs of the action. Cooper must pay the plaintiff's costs relating to the issue of the noise made by him on the premises, except as to the claim under the covenant and the plaintiff must pay Cooper's costs of the excepted issue. The taxing Master will bear in mind that the cases of the stables and motors are quite separate. I cannot leave this case without expressing regret that in view of the value of the property concerned, this expense should have been incurred.

Solicitors : *J. Trevor Booth* (for the plaintiff) ; *Hudson & Co.* (for the first defendant, Wells) and *T. J. Robinson & Son* (for the second defendant, Cooper).

[*Reported by* CHARLES E. EDEN, ESQ., *Barrister-at-Law.*]

EBBW VALE STEEL, IRON AND COAL CO., LIMITED *v.* WILLIAMS.

[COURT OF APPEAL (Slesser, Greene and Scott, L.JJ.), **April 3, 1936.**]

Master and servant—Workmen's compensation—Partial incapacity treated as total—Contract of employment terminated—Probability of obtaining same class of work as before—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 9 (4)—*Workmen's Compensation Act*, 1931 (*c.* 18) *s.* 1.

A disabled miner was in receipt of compensation for total incapacity. The employers gave notice terminating his contract of service, and afterwards brought proceedings to review and diminish the weekly payment. The manager of the colliery said in evidence that if the miner had not had nystagmus he would probably have been working for the employers ; that he made a practice of re-engaging old workmen if he needed them ; and that he was instructed to give the workman notice in consequence of the House of Lords' decision in *Barstow* v. *Ingham's Thornhill Collieries, Ltd.*, [1934] A.C. 304 ; Digest Supp. The county court judge, nevertheless, was not satisfied that the workman would have been employed, or that he was unfit to do the work by reason of nystagmus, or that his failure to obtain employment was consequent either wholly or mainly on his injury. He therefore reduced the amount of the compensation :—

HELD : the evidence that, in spite of the notice terminating employment, the workman would have been re-employed took the case out of the class represented by *Barstow* v. *Ingham's Thornhill Collieries, Ltd.* This evidence established the probability that the workman would, but for the continuing effect of the injury, have been able to obtain the same class of work as before, and the workman must receive his old rate of compensation.

[**EDITORIAL NOTE.** In the case of nystagmus, it commonly happens that a man who has apparently completely recovered from the disease is unable to obtain employment, because colliery owners will not employ anyone who cannot sign a

declaration that he has not had the disease in question. This makes the workman one who, but for the continuing effect of the injury, would be able to obtain work in the same grade in the same class of employment as before the accident and brings him within the 1925 Act s. 9 (4) as amended in 1931. As a result of decided cases the man must prove that his original contract of employment has been determined by notice. Here, however, the evidence of the manager of the colliery went further and showed that, although he had given the employee notice, he made a practice of re-engaging men previously employed if he wanted them. This evidence brought the workman again within the section and he was entitled to compensation upon the footing of total incapacity.

As to Partial Incapacity Treated as Total Incapacity, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, p. 232, para. 547 and Supp, and for Cases, see DIGEST, Vol. 34, pp. 402-406, Nos. 3284-3306. See also WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 228, 257-261.]

Cases referred to :

(1) *Ebbw Vale Steel, Iron & Coal Co., Ltd.* v. *Williams* (1935), 28 B.W.C.C. 267 ; Digest Supp.

(2) *Firbeck Main Collieries, Ltd.* v. *Hopewell* (1932), 25 B.W.C.C. 607 ; Digest Supp.

(3) *Barstow* v. *Ingham's Thornhill Collieries, Ltd.*, [1934] A.C. 304 ; 27 B.W.C.C. 146 ; Digest Supp.

Appeal from an award of His Honour Judge L. C. Thomas, delivered at Newport County Court on Oct. 24, 1935. This case had been before the Court of Appeal on a previous occasion (reported *sub nom. Ebbw Vale Steel, Iron & Coal Co., Ltd.* v. *Williams* (1)), and was sent back for re-trial on account of an ambiguity in the award.

A collier suffered from nystagmus and was certified as fit for light work. On Dec. 21, 1933, the employers submitted to an award for compensation on the basis of total incapacity at the rate of 25*s*. 1*d*. They gave him notice terminating his engagement, and afterwards applied for a review under the Workmen's Compensation Act, 1925, s. 11, saying that there had been a change of circumstance and that they ought only to pay compensation on the basis of partial incapacity, at 7*s*. 1*d*. a week. They admitted that the workman's condition was the same as it had been, but said that the change of circumstance was the notice of termination of employment, which made it less probable that he would, but for the injury, have obtained work of the same class as before. For this contention they relied on the decision of the House of Lords in *Barstow* v. *Ingham's Thornhill Collieries, Ltd.* (3). The manager of the colliery said in evidence that the notice had been given in consequence of the decision in that case, but that he made a practice of re-engaging old workmen and, if Williams had recovered, he would have employed him. The learned county court judge still considered that the case was governed by *Ingham's* case (3), and he was not satisfied that the man would have been re-employed when the first chance came, nor that he was unfitted to do the work by reason of

nystagmus, nor that his failure to obtain employment was consequent on the injury.

The workman appealed.

E. W. Cave, K.C., and *A. A. Warren* for the appellant.

W. Shakespeare, and *Alun Pugh* for the respondents.

SLESSER, L.J.: This appeal succeeds. This is a very unfortunate litigation, but I think by now all the matters in question have been elucidated. I do not think it necessary to state the facts under which this question originally arose, because they are all fully stated under the heading of *Ebbw Vale Steel, Iron & Coal Co., Ltd.* v. *Williams* (1).

The workman sought to show by evidence under the Workmen's Compensation Act, 1931, s. 1, which is "an Act to amend subsect. (4) of sect. 9 of the Workmen's Compensation Act, 1925." that:

> having regard to all the circumstances, it is probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident,

or, alternatively, that:

> his failure to obtain employment is a consequence, wholly or mainly, of the injury.

When the case last came before this court, the court were of opinion that on that second question the learned county court judge had come to no determination, and although he now tells us that he did, he admits that his note was not a clear one. On that occasion we sent the matter back to him and, in sending it back to him, made an order that the trial would not be limited in any way to the consideration of either para. (i) or para. (ii) of sect. 9 (4) of the Act of 1925 as amended, but that the whole matter might be reconsidered

On the reconsideration of the case, evidence was given by Mr. Davies, the manager of the colliery, to this effect:

> If the workman had not had nystagmus he would probably have been working for us. I make a practice of re-engaging old workmen if I need them. I was instructed to give Williams notice. If he had recovered I should employ him. Notice given in consequence of House of Lords' decision.

Now that statement appears to me to be absolutely general in its terms. It contemplates that, after giving Williams notice, none the less he would have employed him. That evidence takes this case entirely out of the class of cases which came before this court and the House of Lords in the two cases of *Firbeck Main Collieries, Ltd.* v. *Hopewell* (2), and *Barstow* v. *Ingham's Thornhill Collieries, Ltd.* (3). In the case of *Firbeck Main Collieries, Ltd.* v. *Hopewell* (2), the facts, so far as they are material, are stated by the learned county court judge as follows:

> I find, and it has in fact been admitted, that (Hopewell) still has his name on the books of the colliery as a working collier; he has never been given notice and his

cards have never been returned to him. Under those circumstances if he were now completely recovered he could go back to the colliery and demand his lamp and the employers could only put an end to his employment by giving him a week's notice.

On that it was held that the workman had taken reasonable steps to obtain employment and that he had satisfied the conditions of sect. 9 (4) because he had shown that, his name being on the books, he would, but for the continuing effects of his injury, "be able to obtain work in the same grade in the same class of employment as before the accident"; that is, at any rate, for the same employer.

Those being the circumstances and the facts: that it was because he was still on their books that he had this chance of being employed, the employers took counsel; and in another case they determined to avoid this consequence—as they were perfectly entitled to do in law—by giving notice terminating the employment and so excluding from the area of possibility that the man would obtain work in the same grade as before, as he would have apart from the injury; that is to say, the possibility of his obtaining work because he was still upon the books of that particular employer. All the observations in *Ingham's* case (3) relate to that state of circumstances, which are set out quite clearly by the learned county court judge at page 148: that, apart from the notice being given to him, it was open to him at any time to come back, and he would have been entitled to be put upon his own job. To avoid those results, notice was given to him. Those cases seem to me to have no application to a case where the evidence is that the man would have been employed upon his own job whether notice had been given to him or not, or whether he was in the employment of the employers or not at the time when he applied for the old job, provided he had suffered his injury in his employment. I may once more cite the evidence of Mr. Davies:

> If he had not had nystagmus he would probably have been working for us.

It must be remembered that the language of the subsection is:

> It is probable that the workman would . . . be able to obtain work in the same grade in the same class of employment as before the accident,

and it is obvious that Mr. Davies was saying in terms that the workman fell within the words of that subsection.

Mr. Shakespeare says that the learned county court judge need not have accepted that evidence. I do not think there is any reason to suppose he did not accept it. I think the learned county court judge misdirected himself in law by saying, both on the first occasion and on the second occasion, that the point appeared to him to be covered by the express decision of the House of Lords in *Ingham's* case (3),

whereas, for the reasons I have stated, *Ingham's* case (3), which is dealing in a limited way with the case of a man only being given a chance of employment when there is a contract of employment still existing, has on the evidence of Mr. Davies, the manager of the colliery, no application to the present case at all. I do not know, but I am inclined to think that, had the learned county court judge refused to accept this gentleman's evidence, it might well have been said he was acting unreasonably, seeing that this is the evidence of the employer himself, which is uncontradicted. That, however, it is not necessary to decide, because in my view he has accepted that evidence, and on that evidence he has, I think, misdirected himself and not given it the effect which it ought to receive. I need only add as to para. (ii), upon which the case was sent back, that he has decided that question on the facts against the workman. I do not think the appeal succeeds on para. (ii), but only on para. (i).

There is this further comment to be made. It has been faintly suggested by Mr. Shakespeare, and rather more prominently by Mr. Pugh, that in any event this man has not satisfied the proviso, because he has not satisfied the judge that he has taken reasonable steps to obtain employment, the onus of doing which Mr. Pugh says—quite rightly, on the authorities—is upon the workman. In my view that point is not open to the employers now in the present case. At the first hearing it was argued that *Ingham's* case (3) governed this case. Mr. Prosser took the point that in the ordinary course the workman would be re-employed if and when work became available for him—in other words, under *Ingham's* case (3), if the man was still under contract. No suggestion was made by anybody at that time that the man was not taking reasonable steps to obtain employment. On appeal to this court the suggestion again was never made that this case should not be sent back because there was no evidence that the man had taken reasonable steps to obtain employment. Such an argument in the mouth of Mr. Shakespeare, for the respondents, would have been a complete answer to sending back the case at all, because they could have said, and with great force, at that time that, even if the judge did alter his opinion upon para. (i) or para. (ii), the workman had failed to satisfy that proviso. Mr. Shakespeare is reported as having said this (1) at pages 270 and 271 :

> The judge did make a decision on clause (ii), as is clearly shown by the printed award which he signed, by not striking out the words in square brackets he must have intended them to apply. . . . The formal award must be taken to be conclusive and the only question for this court is whether there is any evidence on which the county court judge could make such an award. Whether the proceedings were for review or otherwise, the effect of the 1931 Act is that the *onus* is on the workman to show that his incapacity was wholly or mainly due to his injury. . . . The judgment and the formal award should be read together.

There is not a word there to suggest that the proviso had not been satisfied, and the court, acting upon that argument and the argument of Mr. Cave, sent the case back to consider whether the man came, not within the proviso, but within paras. (i) and (ii). Finally, when the learned county court judge dealt with the matter on the second hearing, there was no suggestion whatever that the point that the workman had failed to satisfy the proviso was ever put before the court. In my opinion it would be wrong, having regard to the course this case has taken, to incur still further expense by taking a point which I think, by the whole conduct of the case, must be taken to have been admitted or conceded by the employers.

For these reasons, and because this case is not covered by *Ingham's* case (3), as the learned county court judge wrongly thought, and because the evidence is all one way : namely, that this man, but for his nystagmus, would probably have got work with these employers, as appears from the evidence of their own manager, this appeal must be allowed.

Greene, L.J. : I agree.

Scott, L.J. : I agree.

Appeal allowed, with costs of both trials. Applicant awarded compensation at the rate of 25s. 1d. per week (the sum he was receiving before the application to review).

Solicitors : *Smith, Rundell, Dods & Bockett*, agents for *T. S. Edwards & Son*, Newport (for the appellant) ; *Furniss, Stephen & Co.*, agents for *A. J. Prosser*, Cardiff (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

R. R. JOLY (H.M. INSPECTOR OF TAXES) *v.* PINHOE NURSERIES, LIMITED.

[KING'S BENCH DIVISION (Lawrence, J.), **April 3, 1936.**]

Income Tax—Sched. B—Occupation.

M. conveyed his interest in certain nurseries to the respondents, who went into possession on Sept. 30, 1931. In 1932 M. was adjudicated bankrupt and the trustee in bankruptcy moved to set aside all dispositions made by M., including the disposition to the respondents. An order declaring the dispositions to be void against M.'s creditors was duly made and on Oct. 26, 1932, the trustee went into possession of the nurseries. Sufficient assets having been realised to pay off the only creditor, the trustee went out of possession on Mar. 9, 1933, the respondents returning into occupation. The respondents contended that, as the title of the trustee in bankruptcy related back under the Bankruptcy Act, 1914, s. 37, to the time of the act of bankruptcy, on a proper construction of the Income Tax Act, 1918, Sched. A. No. VII, r. 2, the respondents were not at any time until Mar. 9, 1933, "occupiers" of the nurseries for the purposes of Sched. B. :—

HELD : the respondents were "occupiers" within Sched. A, No. VII, r. 2, and were properly assessed under Sched. B, from Sept. 30, 1931, to Oct. 26, 1932.

[**EDITORIAL NOTE.** The doctrine of the relation back of the title of a trustee in bankruptcy is not seriously in question here. The point is, does such relation back put the trustee into occupation of the property so that he may be assessed to tax thereon under Sched. B. The view taken is that the occupation necessary for an assessment to be made is a beneficial occupation akin to, if not precisely the same as, that required to make a person liable to be rated. The assessment is, therefore, to be made upon the actual occupier and not upon a person who is only an occupier in theory of law.

As TO OCCUPATION FOR THE PURPOSES OF SCHED. B, see HALSBURY, Hailsham Edn., Vol. 17, p. 70, para. 140 ; and FOR CASES, see DIGEST, Vol. 28, pp. 15, 16, Nos. 78, 79.]

Cases referred to :

(1) *Re Simms, Ex p. Trustee*, [1934] Ch. 1 ; Digest Supp.
(2) *Holywell Union & Halkyn Parish* v. *Halkyn Drainage Co.*, [1895] A.C. 117 , 38 Digest 424, *7*.
(3) *Liverpool Corpn.* v. *Chorley Union Assessment Committee & Withnell Overseers*, [1912] 1 K.B. 270 ; 38 Digest 531, *769*.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax for the Division of Edmonton in the County of Middlesex for the opinion of the High Court of Justice. The facts fully appear from the judgment.

The Attorney-General (Sir Donald Somervell, K.C.) and *Reginald P. Hills* for the appellant.

Maurice Lyell for respondents.

LAWRENCE, J. : I regret that in this case I am unable to agree with the view which the commissioners took. The commissioners discharged certain assessments which had been made under Sched. B upon the

respondent company in the following circumstances. The respondent company was formed on May 4, 1931, by a Mr. Moxey to take over certain nurseries which he had been working, and in that company Mr. Moxey, his sister and his housekeeper took all the shares, and the property in the nurseries was conveyed to the company on various dates during July and August, 1931. In the argument before me it was treated as though Sept. 30, 1931, was the date upon which the company went into actual physical occupation of the nursery gardens. Proceedings had been instituted by Mr. Moxey's wife for payment of sums which were alleged to be due to her by her husband, and on Jan. 27, 1932, a receiving order was made against Mr. Moxey. On Jan. 30, 1932, an order of adjudication was made, and subsequently a trustee was appointed in bankruptcy, and on Aug. 16, 1932, the trustee moved to set aside all the dispositions made by Mr. Moxey, including the dispositions of July and Aug., 1931, to the respondent company. On Oct. 26, 1932, His Honour Judge Crawford made an order in the terms of that motion declaring the said dispositions to be void against Mr. Moxey's creditors. On Oct. 26, 1932, the trustee went into possession of the nursery gardens employing the same workmen, and the case states that the 'trustee took over the cash balance of the company at the Midland Bank, that he did not demand from the company any statement as to receipts and payments, or any account of profits, and that he made no demand for damages for trespass and conversion from the company in any form. He then realised the assets so far as was necessary for the payment off of Mr. Moxey's wife, who was the only creditor, and on Mar. 9, 1933, the trustee went out of occupation and the company then continued in occupation. The basis of the order of the commissioners is to discharge the assessments upon the company up to Mar. 9, 1933, and to hold that as from Mar. 9, 1933, the company are to be assessed on the basis that they have begun their occupation on that date, the company being assessable under Sched. B. The respondents' contention is that by virtue of the Bankruptcy Act, 1914, s. 37, the title of the trustee in bankruptcy relates back to the time of the act of bankruptcy on which a receiving order is made against the bankrupt, and that in those circumstances in accordance with the case of *Re Simms* (1), the trustee is entitled where a conveyance is set aside either to treat the person in possession of the property, the subject matter of the conveyance so set aside, either as a trespasser or as an agent, and that in this case on the facts agreed and on the facts found it is only possible to come to the conclusion that the trustee did treat the company as an agent. It is, therefore, contended that the company cannot be treated as an occupier for the purposes of Sched. B within the meaning of Sched. A, No. VII, r. 2, which is incorporated and is applicable to Sched. B, because it is said in the words of that rule: "Every person having the use of

any lands or tenements shall be deemed to be the occupier thereof," and it is said that those words mean : " having the beneficial use of the lands or tenements." It is contended that the trustee, treating the respondent company as its agent during the period between the act of bankruptcy and Oct. 26, 1932, was by virtue of that relationship himself in the beneficial use of the lands, and that the company was only in actual occupation of the lands as agent for the trustee in bankruptcy.

In my judgment that argument is not sound. I think the words of Sched. A, No. VII, r. 2, mean " Every person having the beneficial use of any lands or tenements at the time is to be deemed to be the occupier thereof," and that you cannot alter for the purposes of that rule and for the purposes of the Income Tax Acts the person who is the occupier by doctrines of law which are or may be introduced by the Bankruptcy Act. It has been said in the leading cases on rating which have generally been cited as applicable to income tax matters, in the *Holywell Union* case (2) and in the *Liverpool Corporation* case (3) that occupation is a question of fact, and I think that what the Income Tax Act, Sched. A, No. VII, r. 2, was contemplating was the person who was the occupier in the sense that he had the beneficial use of the lands from day to day and from moment to moment ; and I deduce that from the words of rule 2 and from the provisions of rule 3, which provides that the tax on each assessment shall be levied on the occupier for the time being, and provides that income tax should be assessed under Sched. B upon the occupiers for the length of time that they are in occupation. That this is the right view seems to me probable also from the fact that the relation back of the title of a trustee in bankruptcy may be under the Law of Property Act, 1925, s. 172, for a very long period which would cover the assessment of income tax under Sched. A and Sched. B over several years, and in such cases as that the tax would have been assessed upon and paid by the person who was in fact in occupation of the lands long before the appointment of the trustee whose title related back over that period and who then, according to the respondents' argument, has become *ex post facto* the occupier during all those years.

In my judgment, therefore, those doctrines which depend upon the bankruptcy law have no application, or at any rate I will not say they have no application to the Income Tax Act, but the words of the Income Tax Act must be read as applying to the person who at the time has the beneficial use of the lands or tenements, and he is the occupier thereof.

For those reasons I am unable to agree with the conclusion arrived at by the commissioners, and the case must be sent back to the commissioners, the appeal being allowed, and with a direction that the respondent company was in occupation from Sept. 30, 1931, to Oct. 26, 1932, and from

Mar. 9, 1933, and with that direction the actual assessment would be subject to revision.

The appeal will be allowed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *William Webb & Sons* (for the respondents).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

BOAG *v.* STANDARD MARINE INSURANCE CO., LTD.

[King's Bench Division (Branson, J.), **March 31, 1936.**]

Insurance—Payment as for total loss—Salvage—Subrogation—Contribution to underwriters of excess value policies.

A cargo carried on a certain steamer was insured under an ordinary policy, and also under an excess value policy. The steamer was stranded and both insurers paid for a total loss and took a letter of subrogation from the owners. Under the ordinary policy a sum of £685 was paid. On a general average adjustment being made £532 4*s.* 8*d.* was agreed as the sum arising as salvage to be received by the owners. This sum was claimed by the insurers under the ordinary policy, but the underwriters of the excess value policy claimed to share rateably in the salvage :—

Held : the insurers under the ordinary policy were entitled to the whole sum of £532 4*s.* 8*d.*

[**EDITORIAL NOTE.** Subrogation is a matter between the insurer and the insured, and apart from express contract, it does affect the rights of different classes of insurers. It is true that there is a right of contribution between insurers who have separately issued policies covering the same insured in respect of the same adventure and interest, but this right has never been held to exist where the original policy is a valued policy and the further policy covers some further risk. It is to be noted that there was no evidence of any custom to take out excess value policies and there could therefore be no implied condition in the original policy that the insured should do so.

As to Subrogation, see HALSBURY, Hailsham Edn., Vol. 18, pp. 376-381, paras. 543-547 ; and for the Cases, see DIGEST, Vol. 29, pp. 290-292, Nos. 2355-2380.]

Cases referred to :

(1) *North of England Iron S.S. Insurance Assocn.* v. *Armstrong* (1870), L.R. 5 Q.B. 244 ; 29 Digest 292, *2378.*

(2) *Thames & Mersey Marine Insurance Co.* v. *British & Chilian S.S. Co.*, [1916] 1 K.B. 30 ; 29 Digest 292, *2379*

Interpleader Issue upon the following agreed statement of facts.

The Pentirion Steamship Co., Ltd., were at all material times owners of the ss. "Penthames." Bodey, Jerrim & Denning, Ltd., were at all material times owners of a consignment of Italian wheaten sharps consisting of 1,000 bags weighing 50 tons, and 1,325 bags weighing 99 tons odd. The consignment formed part of the vessel's general cargo from Mediterranean ports to the United Kingdom, and

was shipped at Naples on Sept. 17, 1934, for delivery at Bristol. The c.i.f. invoice value of the consignment was £635 18*s.* 1*d.*, but owing to an appreciable advance in the price of that commodity the gross value at the intended port of discharge was £1,043 16*s.*, and after deduction of duty, landing charges, etc., it had a net value of £899 14*s.* 8*d.*

The cargo owners had taken over policies, dated Sept. 19, 1934, which their sellers had effected on the cargo with the Standard Marine Insurance Company, on a total valuation of £685. The cargo owners also insured their consignment with certain underwriters at Lloyd's, of whom the present plaintiff Boag was the representative, for £215 on increased value of cargo, by declaration made on Sept. 28, 1934, against a floating policy dated Sept. 5, 1934, on increased value for £5,000.

The steamer, after leaving Naples, loaded at other Mediterranean ports, and while going to Alicante for further cargo, ran aground off Cape Huertas on Sept. 27, 1934. To enable the steamer to be refloated, some of her cargo, including the cargo the subject of this dispute, was jettisoned and became a total loss.

On Oct. 9, 1934, the owners made a claim on the Standard Marine Insurance Company for a total loss, and on Nov. 5, 1934, that company paid the claim in full, having on Nov. 3, 1934, taken a letter of subrogation from the owners.

The owners then claimed against the increased value underwriters for a total loss under their policy, and on Dec. 11, 1934, those underwriters paid the claim in full, and on Dec. 14, 1934, they took a letter of subrogation from the owners.

A general average adjustment was prepared, and in it the consignment ranked for allowance at £900 (being its sound arrived value), and after deducting the general average contribution of the consignment the balance to be received was £532 4*s.* 8*d.*

The Standard Marine Insurance Company, as cargo underwriters, claimed to be entitled to the whole of the £532 4*s.* 8*d.* under their subrogation rights.

The increased value underwriters claimed to be entitled to £127 2*s.* 11*d.*, as representing 215/900, their proportion of the general average allowance applicable to the increased value policy. Their claim was also made under their rights of subrogation.

The cargo underwriters had no knowledge of the existence of the increased value policy until after they had paid for a total loss.

C. T. Miller for the excess value underwriters.

W. L. McNair for the Standard Marine Insurance Co.

BRANSON, J.: This case was tried by me upon an agreed statement of facts which states quite concisely the circumstances in which the point for my decision arises. It would be waste of time, therefore, to read it as part of my judgment. I take it as read. The point to be decided is whether the Standard Marine Insurance Co., Ltd., hereinafter called the company, is entitled to the whole of the £532 4*s.* 8*d.* arising as salvage in respect of the cargo insured by them, or whether the underwriters of the excess value policy hereinafter called the underwriters are entitled to a proportionate share of that sum.

The case for the company is that, having covered the cargo for the whole of its value as agreed between them and their assured in their policies of Sept. 19, 1934, and having paid that amount in a claim for a total loss, they became entitled under the Marine Insurance Act, 1906, s. 79, to take over the interest of their assured in whatever remained of the subject matter, and that they exercised that right by

accepting the cargo owner's letter of subrogation on Nov. 3, 1934. If the dispute were one between the company and their assured, the company would clearly be entitled to succeed on the decision of the *North of England Iron S.S. Insurance* v. *Armstrong* (1). The criticisms of some of the *dicta* in that case do not affect it in its application to the present one because even if the company recovers the whole of the £532 4*s*. 8*d*., they will still receive less than the amount paid out by them, which was £685. The *ratio decidendi* both of the *North of England* case (1) and of the case of the *Thames & Mersey Marine Insurance Co.* v. *British & Chilian S.S. Co.* (2), in which Scrutton, J., as he then was, followed it was that the amount fixed by the policy as the value of the subject matter insured was conclusive between the parties to the contract of assurance—so that the assured could not be heard to say that the amount recovered as salvage was based upon a higher value and that he was his own insurer for the excess.

This being admittedly the position as between the company and the assured, the question is whether the underwriters can have any greater right against the company than their assured has. If they can, it must have arisen by operation of law, for the assured had on Nov. 3, by taking payment as for a total loss from the company and by giving the company a letter of subrogation, divested himself of all his interest in the salvage. The argument for the underwriters is that just as the right of contribution between insurers who have separately issued policies covering the same assured in respect of the same adventure and interest arises independently of any contract between them, so there is a correlative right in each insurer to subrogation which is unaffected by any contract between any insurer and the assured. No authority is to be found for this proposition in the case where the original policy was a valued policy, but it is based upon the analogy of the position created by over insurance by double insurance. Equity, it is urged, decrees that each insurer shall contribute rateably to the sum receivable by the assured, and equity should equally provide for them to share rateably in any salvage. I think the suggested analogy fails in a case like the present. No right of contribution arose as between the company and the underwriters which could form the basis of any right to share in the salvage.

Next, it is contended on behalf of the underwriters that as soon as a contract of insurance is entered into, there arises a right to subrogation in the event of a total loss being paid—that such right is inchoate only until the loss is paid, and so where successive policies have been effected, each policy gives rise to an inchoate right, all of which crystalise as from the time of the casualty causing the loss and so are all equally valid.

It seems to me that this contention is unsound. It depends upon the theory that subrogation arises by operation of law and independently of anything done between the parties. Whatever might have been said

for this theory before the Act of 1906, the language of sect. 79 is conclusive to show that subrogation is not effected as a matter of course. If it were, an insurer having paid a total loss could sue in respect of the subject matter in his own name, which, so far as I know, has never been allowed. The true view appears to me to be as stated in PHILLIPS ON INSURANCE, Vol. 2, para. 1715, Estrangin, says, that :

> any convention between the owner and freighter cannot affect the rights of the insurer under an abandonment. The rights of an underwriter cannot be affected by any contract made by the assured with another underwriter or any other person, except so far as the assured is supposed to reserve the right of making such other contract, and the underwriter to subscribe the policy under an implied condition that the assured may avail himself of such right.

If there had been evidence that it was so usual nowadays to take out excess value policies that underwriters must be taken to subscribe original policies under an implied condition that the assured might do so, the matter would have been different. But there being no such right expressly reserved and no evidence to justify its implication, I think the underwriters fail to show that the company is not entitled to the whole of the £532 4*s*. 8*d*.

Solicitors : *Botterell & Roche*, agents for *Weightman, Pedder & Co.*, Liverpool (for the underwriters) ; *Ince, Roscoe, Wilson & Glover* (for the Standard Marine Insurance Co.)

[*Reported by* FRANK ROWE, ESQ., *Barrister-at-Law.*]

HODGE *v.* MARSH.

[Privy Council (Lord Alness, Lord Maugham, Sir Sidney Rowlatt), **March 2, 1936**]

Privy Council—Practice—Abatement by death of party—Death before appeal heard—Party not appearing and not represented—Appeal in divorce matter—Reserved judgment prepared—Discovery of death of party.

In an appeal to the Privy Council against the making of a decree absolute in a divorce suit the respondent died two days before the hearing of the appeal. As the respondent had not appeared and was not represented at the appeal, the appeal was heard in ignorance of his death. The Board reserved judgment and when the report of the Board had been prepared and was ready for delivery, the fact of the death of the respondent became known :—

Held : the appeal abated at the moment of the death and the reserved judgment could not be delivered.

[EDITORIAL NOTE. Generally speaking an appeal does not abate by the death of a party, and in *Smith* v. *Williams*, [1922] 1 K.B. 158, 24 Digest 728, *7556*, the court went so far as to say that where no proper procedure existed to prosecute the appeal, a convenient form of procedure would be moulded by the court. The same rule has not, however, been applied in divorce matters and in personal actions to which the maxim *actio personalis moritur cum persona* applies. The application of this doctrine has, of course, been recently limited in England.

In the Law on the point, see HALSBURY, Hailsham Edn., Vol. 14, p. 304, paras. 555-557; and for Cases, see DIGEST, Practice, pp. 464-466, Nos. 1489-1508.]

Case referred to :

(1) *Flood* v. *Egan* (1899), 20 N.S.W.L.R. 333 ; 16 Digest 165, case (*o*).

Appeal pursuant to special leave granted on Aug. 14, 1934, from an order of the Supreme Court of Jamaica made on Jan. 18, 1934. The order refused to grant the appellant an extension of time for filing affidavits in support of his intervention to show cause why a decree *nisi* in a divorce suit should not be made absolute and from the order of the Supreme Court made on Jan. 19, 1934, making the decree absolute in the suit for divorce. At the hearing of the appeal the respondent did not appear, nor was he represented. The appeal was heard and the Board reserved judgment. The judgment was duly prepared, but before it was delivered it was discovered that the respondent had died two days before the appeal was heard.

Comyns Carr, K.C., S. Parnell Kerr, and *R. O. Wilberforce* for the appellant.

Kerr : There is jurisdiction to deliver the judgment (*Flood* v. *Egan* (1) and the Judicial Committee Rules, 1908, r. 51). The report should stand over pending the putting in of a petition to add the wife (the respondent in the suit) as respondent *pro forma*, since she had an interest in the matter. The question involved was an important one for her, since if the decree absolute were held to be bad, she was a married woman at the date of the death of the respondent to the appeal.

LORD ALNESS: In the circumstances the Board are unable to deliver judgment as the appeal, being one in a personal action, has abated at the moment of the respondent's death.

Solicitors: *Piper, Smith & Piper* (for the appellant).

[*Reported by* S. P. KHAMBATTA, ESQ., *Barrister-at-Law.*]

EARL OF ST. GERMANS AND ANOTHER *v.* BARKER AND ANOTHER.

[CHANCERY DIVISION (Crossman, J.), **March 19, 20, 1936.**]

Mortgage—Leaseholds mortgaged by subdemise—No trust of nominal reversion—Equity of redemption statute-barred before 1926*—Transitional provisions—Privity of estate between lessor and mortgagee—Law of Property Act,* 1925 (*c.*20), *s.* 89 (3), *Sched. I, Part II, para.* 3.

Prior to 1926 the equity of redemption of leaseholds, which had been mortgaged by subdemise without any trust of the nominal reversion, became statute-barred. The mortgagees did not after 1925 execute a declaration that the head term had become vested in them under Law of Property Act, 1925, s. 89 (3). Upon the expiration of the lease, the reversioners sought to make the mortgagees liable upon the repair covenant in the lease, on the ground that the whole term had automatically vested in them under the transitional provisions of the Law of Property Act, 1925:—

HELD: this was not a case within Law of Property Act, 1925, Sched. I, Part II, para. 3. The words "entitled to require any legal estate to be conveyed" did not cover the case of a person who under sect. 89 (3) had power to declare a legal estate vested in himself; but only applied to cases where he could "require" someone to convey to or vest the legal estate in him, and the mortgagees were not liable on the covenant to repair.

[**EDITORIAL NOTE.** The transitional provisions here referred to (Law of Property Act, 1925, Sched. I, Part II) have often been spoken of as omnibus provisions, getting in all outstanding legal estates; but the better view has always been that their operation does not extend to legal estates purposely left outstanding. Here the nominal reversion was not held in trust for the mortgagee and his assigns and therefore was *prima facie* a legal estate purposely left outstanding and for the purpose of avoiding the very liability here sought to be imposed on the mortgagees. The decision here, however, turns upon the fact that Sched. I, Part II, para. 3 speaks of a person entitled to "require any legal estate to be conveyed" and this it is said applies only to the case of a conveyance of a legal estate by some other person and not to a declaration by the person himself enlarging his own term.

AS TO DECLARATIONS BY MORTGAGEES WHERE THE EQUITY OF REDEMPTION IS BARRED, see HALSBURY, Hailsham Edn., Vol. 20, p. 743, para. 1012, and FOR THE LAW OF PROPERTY ACT, 1925, s. 89 (3), and SCHED. I, PART II, PARA. 3, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 15, pp. 269, 393]

Case referred to:

(1) *Peachey* v. *Young*, [1929] 1 Ch. 449; Digest Supp.

ACTION for damages for non-performance of a covenant to repair. By a lease dated Aug. 21, 1857, certain premises were demised for

a term of 80 years from Sept. 29, 1855. The premises comprised in and demised by the lease were mortgaged on Nov. 9, 1857, and such mortgage was by subdemise for the residue of the term less the last three days thereof, but contained no declaration of trust of the nominal reversion. The mortgagees entered into possession in 1896 and in 1921 the mortgage was transferred to the defendants. On Jan. 1, 1926, on the coming into force of the Law of Property Act, 1925, the position was that the equity of redemption in the mortgaged property was statute-barred. In 1935, upon the expiration of the term granted by the lease, the premises being then in want of repair, the freehold reversioners required the defendants to put the premises into a proper state of repair in accordance with the covenants in the lease. The defendants refused to do so, alleging that the term created by the lease had never become vested in them and that there was no privity of estate between them and the freehold reversioners. The latter then brought this action.

F. C. Watmough for the plaintiffs: The legal estate created by the lease vested in the defendants on Jan. 1, 1926, by virtue of the Law of Property Act, 1925, s. 89 (3) and Sched. I, Part II, para 3. They were thereby entitled to require that it should be conveyed to or vested in them. There is thus privity of estate between the plaintiffs and defendants and the covenant in the lease is enforceable against the defendants. I rely on *Peachey* v. *Young* (1).

Humphrey King for the defendants: Law of Property Act, 1925, Sched. I, Part II, para. 3, does not apply to this case. The mortgagee had not to "require" anyone to vest the legal estate in him, but had only to execute a vesting declaration declaring it to be vested in himself. This case can only be brought within the paragraph by straining its language. The defendants have done nothing to vest the legal estate in themselves.

Crossman, J.: This is a question of construction. The question is whether a person entitled to exercise the power conferred by the Law of Property Act, 1925, s. 89 (3) is a person entitled to require a legal estate to be vested in him under Sched. I, Part II, para. 3 of the Act. I feel bound to come to the conclusion that it would be straining the meaning of the words of the paragraph to hold that they include a person who had the power himself, without requiring or doing anything at all except executing a deed, to cause the legal estate to be vested in him. The words "entitled to require any legal estate to be conveyed" mean to require some other person to convey that legal estate. I find a difficulty in seeing how the word "require" can apply to a case where a person can do the act of his own volition. There is no reason for putting an unnatural construction on the language, since the effect of bringing this case within the Act would be to put a liability upon the

defendants to which they would not otherwise be subject. Sect. 89 (3) deals with a person having a power whereas para. 3 contemplates a person having an estate or interest. *Peachy* v. *Young* (1) was a case of a covenant to assure the nominal reversion. The result is that the head term has not become vested in the defendants and there is no privity between them and the plaintiffs. The plaintiffs have no right to enforce the repairing covenant against the defendants and the action must be dismissed.

Solicitors : *Tamplin, Joseph, Ponsonby Ryde & Flux* (for the plaintiffs) ; *Lethbridge, Money & Prior* (for the defendants).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

THE EXECUTORS OF ARTHUR MARSHALL, DECEASED, THE EXECUTORS OF E. W. HOOD, DECEASED, AND LOUIS JAMES ROGERS *v.* R. R. JOLY (H.M. INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Lawrence, J.) **April 2, 1936.**]

Income Tax—Executors—Realisation of estate—"Carrying on trade."

M., H. and R. carried on in partnership a trade of dealing in land. Land purchased by the partnership was, by agreement, developed and sold by a limited company, and the price to be paid to the partnership for the land so developed was fixed after the sale. H. died and at the date of his death certain land belonging to the partnership was in the course of development by the limited company. His executors agreed that the most practicable way in which to realise the assets was to allow the development of the land to be completed, and to postpone the account until the land had been sold. His executors were assessed for income tax on the profits made after H's death on the ground that they were carrying on the partnership business :—

HELD : there was no evidence that H's executors had agreed to carry on the partnership business, the agreement being merely to postpone their right to an account and to their share of the proceeds until such time as it was practicable to realise the assets.

[**EDITORIAL NOTE.** It is of importance to executors and administrators of estates to know how far they can in the legitimate exercise of their powers to postpone the realisation of the deceased's estate delay the sale and getting in of property. The postponement often brings with it many difficult problems, and here it resulted in a claim for income tax upon the profits of a business. It was, however, held that despite considerable postponement, the executors were not carrying on the testator's business, but merely awaiting a favourable opportunity for realisation.

AS TO WHAT IS CARRYING ON A BUSINESS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 96, 97, para. 191 ; and FOR CASES, see DIGEST, Vol. 28, p. 22, Nos. 108-119.]

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax for the Division of Edmonton in the County of Middlesex for the opinion of the High Court of Justice. The facts fully appear from the judgment.

T. Donovan for the appellants.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondent.

Lawrence, J.: In this case the commissioners have confirmed assessments for the years 1930/1, 1931/2, 1932/3 and 1933/4, made for the year 1930/1 upon the firm of Marshall and Hood, and in the other years apparently upon the same firm, mentioning the partners in the firm, in the first year of assessment, as Marshall, Hood and Rogers, and in the other years as Marshall's executors, Hood's executors and Rogers. The assessments were made upon the firm in respect of profits arising from the trade of dealing in land. The circumstances of the case are as follows: Messrs. Marshall, Hood and Rogers had for several years been carrying on a trade or business of dealing in land in partnership. They had promoted a company, I think it was in 1926, in which they and certain other people, who are said to have been relatives of theirs, held shares. This company built houses, upon the land which had been purchased by the partnership, under an agreement with the partnership —a verbal agreement—by which the company built houses upon the land, advertised them for sale, and disposed of them, and then agreed with the partnership as to the price that was to be paid to the partnership for the land which belonged to the partnership. On the prices so paid by the company or by the purchasers of the land and houses to the partnership, the partnership was assessed during the years up to 1930, and income tax was paid upon those profits. In July, 1930, Mr. Hood died. In the year 1932 Mr. Marshall died. The assessments which are now in question are in respect of profits which were made after the death of these two gentlemen. The question is whether there was any evidence before the commissioners that those profits were the profits of a trade which was carried on by the executors of Mr. Hood and the executors of Mr. Marshall after their deaths.

The facts were agreed and a written statement of agreed facts was put in before the commissioners; and I am told that there was no other evidence. It does not appear from the case that any other evidence was given. The most material part of the facts was stated in para. 14 of the agreed facts. The paragraph is as follows:

> Upon the death of Mr. Hood, his executors, namely, the Public Trustee and Mrs. J. R. B. Hood and Mr. E. G. Hood, required Mr. Marshall and Mr. Rogers to realise the land remaining unsold and to pay to them the share of the proceeds of the realisation to which they were entitled as such executors. There was no provision in the will of Mr. Hood enabling his executors to carry on a trade in land or any other trade or business.

Pausing there, that was the right (and the only right) of the executors of the deceased partner. They had no right to the land itself: they

only had a right to an account of the deceased testator's share in the proceeds. The paragraph goes on :

> The limited company—

that is the company to which I have already referred—

> was at the time of the death of Mr. Hood in course of building houses on about 7 acres, being part of the 15 acres last mentioned and had laid sewers and constructed roads thereon. It was considered by the Public Trustee and the other executors of Mr. Hood, and by Mr. Marshall, that the only practicable way in which these 7 acres could be realised was to allow the company to complete the houses which they had already commenced to build and sell them to purchasers, and then account to the said executors and Mr. Marshall for that part of the purchase price due to them in respect of the land. The statutory trustees in whom the land was vested agreed to this method of procedure and the land was sold by them to purchasers found by Marshall, Hood Limited.

Pausing there, those are, in my judgment, the crucial facts upon which the commissioners had to decide whether there was any evidence before them that Mr. Hood's executors agreed to carry on this trade in land, which had previously been carried on by Mr. Hood, with Mr. Marshall and Mr. Rogers. In my opinion those facts are no evidence upon which a tribunal of fact could come to the conclusion that Hood's executors entered into any such agreement. The paragraph goes on :

> The remainder of the land unsold at the date of Mr. Hood's death, was not being built upon and was sold in four blocks by the statutory trustees. The realisation of the whole of the land except one block had been completed by Nov., 1931, and the sale of the remaining block was completed in Oct., 1933. The executors of Mr. Hood have been paid their share of the net realisation. The reason why the final block of land was not sold until Oct., 1933, was that it proved to be difficult to sell, and a purchaser was not found until that date.

Turning to the case of Mr. Marshall, Mr. Marshall died in 1932, and the only thing that was done after his death was the sale of this one block of land.

Those are the relevant facts, as I have said, upon which the commissioners had to decide whether the executors of Mr. Hood and the executors of Mr. Marshall carried on a trade after their deaths so as to attract income tax to the profits which arose from that trade. The commissioners have stated their finding in para. 12 of the case stated, where they say :

> We now come to what took place after the death of Hood—July 5, 1930. At that date we are informed that of the 48½ acres bought, 17 acres remained undisposed of—of these 17 acres, 7 acres were in process of development by the company—the remaining 10 acres were not being built upon. After consultation between Mr. Marshall and Mr. Hood's executors it was agreed that the development of these 7 acres by the company should proceed and as the houses were sold Mr. Marshall, Mr. Hood's executors and Mr. Rogers would receive their part of the purchase money for the plots of land, in other words would carry on as before.

With all respect to the commissioners, that is a paraphrase of the agreed facts which is not justified by those facts. The agreed facts do not evidence, in my opinion, an agreement by Mr. Hood's executors to carry on the business as before. They merely evidence an agreement by Mr. Hood's executors that their rights to an account and to their share of the proceeds of the partnership assets should be postponed until the time arrived when it was practicable to realise those assets. It is further stated in para. 14 that prior to the death of Mr. Hood the partnership, trade or business admittedly consisted merely of selling land at enhanced prices—no development of the land by the partnership ever took place—the development of the land—making roads, laying sewers and drains—building houses was carried out by a limited company which, as was pointed out by counsel for the appellants, is an entirely distinct entity from its shareholders and certainly from the individuals composing the partnership of Marshall and Hood. After the death of Hood and after consultation with his executors precisely the same course is pursued so far as regards the land in course of development. That is, of course, true in one sense. Precisely the same course was carried out, but it was not by agreement between Hood's executors and the other partners or Marshall's executors, Hood's executors and Mr. Rogers that the trade should be carried on by them, but was simply, in my judgment, an agreement by those executors that their rights to an account should be postponed until the assets could be realised by the statutory trustees. I am therefore of opinion that the decision of the commissioners cannot stand.

Other questions were argued before me as to the assessments being in the wrong names because the first assessment for 1930/1 was made upon the partnership firm of Marshall and Hood which the commissioners appear to find was the name in which the partnership business had been carried on up to the death of Mr. Hood, and in 1931/2 the assessment was made on that partnership firm, the partners of the firm being shown as Marshall, Hood and Rogers. The criticism which was made upon that on behalf of the appellants was that it was altogether irregular and improper for an assessment to be made upon a man who was dead, and it was said that the assessment was made upon Mr. Hood. In a similar way, similar criticism was made upon the subsequent assessment of 1931/2, because there the partners in the firm were shown as Marshall's executors, Hood's executors and Rogers. Mr. Marshall, at the time of the assessment of 1931/2, was still alive. I do not think it is necessary for me to decide this point in this case. I am not at all clear that, if the commissioners had been entitled to find, as I hold they were not, that a partnership had been formed between Hood's executors, Marshall and Rogers in the first instance and between Hood's executors, Marshall's executors and Rogers in the second instance, they might not have found

properly that that partnership was to be carried on in the old partnership name of Marshall and Hood and that the assessments would not be invalidated by a mere erroneous statement of the names of the partners. It is not necessary for me to decide that. I hold, as I have already said, that the assessments cannot stand, because there was no evidence, in my view, upon which the commissioners could hold that Hood's executors or Marshall's executors ever entered into a partnership to trade in land. The appeal will therefore be allowed with costs.

Solicitors: *Barnes & Butler* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

THE DOVER HARBOUR BOARD, THE OWNERS, AND THE MASTER AND CREW OF THE STEAM TUG "LADY DUNCANNON" *v.* THE OWNERS OF THE STEAMSHIP "EISENACH," HER CARGO AND FREIGHT.

THE OWNERS, MASTERS AND CREWS OF THE SALVAGE VESSELS "SIMSON" AND "GOLIATH" *v.* THE OWNERS OF THE STEAMSHIP "EISENACH," HER CARGO AND FREIGHT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J., with Trinity Masters), **March 25, 26, 27, April 1, 1936.**]

Shipping—Salvage—Sound value—Restrictions on exchange—Restrictions on sale of ships.

The "Eisenach," a German ship, was salved and towed into Dover Harbour, and the salvors alleged that her sound value at the time the services ended was £45,000. This figure was arrived at by taking the sum of 550,000 marks which was the price at which the ship was subsequently sold, and converting it into sterling at the rate of 12.2 marks to the £. There was no reliable standard upon which such conversion into sterling could be made, and the usual method of assessing the value of a salved ship based upon sales of similar vessels, was not available, as the shortage in Germany of foreign exchange prevented such sales. Evidence having been given that the cost of building a similar ship in Germany would be approximately three times the sum of 550,000 marks for which the salved ship had been sold:—

HELD: the salved value of the ship was one third of the cost in sterling of building a new and similar ship in England less the cost of repairs.

[**EDITORIAL NOTE.** The amount of a salvage reward is in the absence of a special contract limited to the value of the property or interest in property salved. In the ordinary way evidence is given of the price the salved ship would fetch in the open market. The difficulty here is that there was no open market and although the ship was in fact sold in Germany it was impossible owing to restrictions to say what the true rate of exchange between England and Germany was. As is well known judgments of an English court have to be expressed in sterling and it was necessary to find some method by which the salved value could be so expressed.

As to Salvage Reward, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 574-579, paras. 871-883; and for Cases, see DIGEST, Vol. 41, pp. 880-883, Nos. 7621-7660.]

Two Actions consolidated brought to recover in respect of salvage services rendered by the plaintiffs to the "Eisenach." The only point upon which these cases are reported is the assessment of the salved value, such assessment being complicated by the fact that the basis of such assessment was in marks and no proper rate of exchange is available as between marks and sterling and by the further fact that the owners of the "Eisenach" were obliged by law to spend the proceeds of sale of the salved ship on building new tonnage in Germany.

Kenneth Carpmael, K.C., and *J. V. Naisby*, for the plaintiffs in the first action.

Lewis Noad, K.C., and *R. F. Hayward, K.C.*, for the plaintiffs in the second action.

H. G. Willmer and *T. Bucknill*, for the defendants.

Bucknill, J.: The "Eisenach" is a steel screw steamship and at the time of the services belonged to the Norddeutscher Lloyd Steamship Company. The "Eisenach," which was built in Germany in 1922 is 4,159 tons gross and 6,515 tons dead weight capacity and has passenger accommodation for thirteen passengers. Her speed is said to be about 11 knots. At the time of the services the "Eisenach" was bound from the Black Sea to Hull with a cargo of rape seed. The value of the cargo is agreed at £30,000. There was no freight at risk. There is a dispute between the parties as to the salved value of the "Eisenach." The salved value is the value of the ship at the time when and the place where the services ended. In this case the services ended on Aug. 31, 1935, in Dover Harbour. The salved value of the "Eisenach" may be taken as the sound value less the cost of repairs. The dispute is as to the sound value. The repairs cost about £7,000.

The plaintiffs say that the sound value was £45,000. The defendants say that the sound value was £21,000. The plaintiffs' figure of £45,000 is based on the fact that shortly after the services while the ship was being repaired at Bremen she was sold by her owners to some Bulgarian buyers for a net figure of about 550,000 marks. The plaintiffs say that this figure of 550,000 marks should be converted into sterling at the rate of 12.2 marks to the £, which produces a figure of about £45,000. On the other hand the defendants say that this figure of 550,000 marks is not satisfactory evidence of the value of the ship to her owners and that in any case the rate of exchange should not be 12.2. The figure of £21,000 put forward by the defendants as the sound value of the "Eisenach" is their estimate of the market value of the ship if sound at the time when the services ended.

The court has to assess the pecuniary benefit conferred by the salvors upon the owners of the salved property, and in order to make this assessment, fixes, as one of the essential factors in that pecuniary benefit, the value of the property to the owners at the time of the service. It may be said with accuracy that the sound value of the "Eisenach" to her owners at the time of the service was the figure of 550,000 marks, credited to them as the proceeds of the sale of the ship. But the nature of the transaction with the Bulgarian buyers was such that the owners of the "Eisenach" were obliged by law to spend the proceeds of sale on building new tonnage in Germany. They were not allowed by their law to convert the proceeds of sale into sterling—even if they had been able to do so. In any case, I do not think, having regard to the evidence which was placed before me, that they could have converted this sum into sterling at the rate of 12.2 to the £, or anything like it. Now the judgment of this court is in sterling, and in order to assess in sterling the pecuniary benefit received by the owners of the salved property, the value of the salved property to the owners must also be fixed in sterling. The difficulty of arriving at the salved value in sterling of the "Eisenach" is that the ship is a German ship, and the relative values of the mark and the £ sterling appear to be, on the evidence, in a very fluid and uncertain state, so far as transactions like the sale and purchase of a ship are concerned. I do not think there is any reliable standard by which I can convert this sum of 550,000 marks into sterling. I therefore have to look at the other evidence before me as to the value of the "Eisenach," to see what assistance it provides.

One fact which emerged in the evidence is that it would cost the owners of the ship roughly 1½ million marks to build a ship like the "Eisenach" to-day. Comparing marks with marks, if the owners received roughly half a million marks for the ship from the buyers, it appears that the ship was worth to them about one-third of the cost price of a new ship. The cost in sterling to build a new ship like the "Eisenach" was given in evidence by the plaintiffs before me as £93,500 and by the defendants as £82,000.

Fixing the value of the "Eisenach" on the basis of the cost of building a new ship like her, I think the sum of £30,000 would be a proper sum to take as her sound value when the services ended. This figure of £30,000 is rather less than the figure of £33,500 which the plaintiffs suggested would be the market value of the ship, based on the cost price of £93,500, less 5 per cent. depreciation per annum for each of the thirteen years of the "Eisenach's" age. The market value of the ship, based on the sales of other vessels, is the usual method of assessing the value of the ship. But in this case the evidence is that if the ship had been lost to her owners, it would have been difficult for the German owners to replace her by purchase from any foreign owners in the open market,

because of the shortage in Germany of foreign exchanges wherewith to pay the purchase price.

Also, there is really no comparable sale of a like ship about the time of the salvage as a guide to the market value of the "Eisenach," if sold for instance by the Admiralty Marshal. Such evidence as was put forward indicated to me that the ship if so sold would probably fetch something in the neighbourhood of about £29,000. Ships belonging to the Norddeutscher Lloyd are known to be thoroughly well built and well maintained. My view also is that to the German owners of the "Eisenach" the vessel was worth rather more than her market value, because of the difficulty which they would have of replacing her by purchase abroad.

Having regard to all these considerations, and doing the best I can with the material at my disposal, I think that a fair sound value to put on the ship at the time when these services ended is £30,000. From this sum has to be deducted £7,000, cost of repairs, which gives a salved value of £23,000.

The total salved values are therefore £53,000.

Solicitors: *Mowll & Mowll*, agents for *Mowll & Mowll*, Dover (for the plaintiffs in the first action); *Constant & Constant* (for the plaintiffs in the second action); *Stokes & Stokes* (for the defendants).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

MAURICE KLIMAN (H.M. INSPECTOR OF TAXES) *v.* B. STONE.
W. J. HILLS (H.M. INSPECTOR OF TAXES) *v.* THE LONDON FREEHOLD AND LEASEHOLD PROPERTY COMPANY, LIMITED.

[KING'S BENCH DIVISION (Lawrence, J.), **April 1, 1936.**]

Income Tax—Valuation of property—Additional assessment—Preparatory year and year of revaluation—Income Tax Act, 1918 (*c.* 40), *s.* 125—*Finance Act*, 1930 (*c.* 28), *ss.* 28, 31, 32, *Sched. I, Part I.*

(i) By the Finance Act, 1930, Sched. I, Part I, the assessors were bound in the year 1930 to bring in the certificates of their assessments of annual values on Nov. 30, 1930. Certain property was at that time empty and was not occupied until Jan. 31, 1931. On Apr. 5, 1932, upon discovering the letting, the commissioners made an additional assessment, under Income Tax Act, 1918, s. 125 :—

HELD : the additional assessment was properly made.

(ii) On Jan. 30, 1930, the tenant of certain property let for a term of ten years from Dec. 25, 1920, at a rent of £180 per annum, made a return under the Valuation (Metropolis) Act, 1869. On Aug. 30, 1930, the tenant agreed to continue his tenancy for one quarter from Dec. 25, 1930, at a rent of £100 for the quarter. On Apr. 24, 1931, the property was let for a term of 21 years from Mar. 25, 1931, at a rent of £300 per annum. On Aug. 10, 1931, an assessment was made in ignorance of the agreement of Aug. 20, 1930, and of the lease of Apr. 24, 1931. Upon discovering these facts the commissioners made an additional assessment under Income Tax Act, 1918, s. 125 :—

HELD : the additional assessment was properly made.

(iii) There is nothing in the Income Tax Acts to prevent the commissioners from considering facts which arise in the preparatory year after the date fixed for the bringing in by assessors of their certificates of their assessment of annual values, or at any time in the year of revaluation.

[**EDITORIAL NOTE.** There have been several cases upon the word "discovers" in the Income Tax Act, 1918, s. 125 (1). The present case does not appear to turn upon the same point as these previous cases. It appears to suggest that any increase of value during the preparatory year or the year of revaluation or any further evidence as to the correct value at that time is the proper subject of an additional assessment. It leaves open the question of an increase of value in any year subsequent to the year of revaluation. That position was, however, considered in the case of *Inland Revenue Comrs.* v. *Dickson*, [1928] S.C.752 ; Digest Supp.

AS TO ADDITIONAL ASSESSMENTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 339-341, paras. 687-692, and FOR CASES, see DIGEST, Vol. 28, pp. 98, 99, Nos. 586-592 ; FOR THE INCOME TAX ACT, 1918, s. 125, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 9, p. 486, and FOR THE FINANCE ACT, 1930, see Vol. 23, pp. 143-148.]

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax, for the Division of Kensington in the County of Middlesex for the opinion of the King's Bench Division of the High Court of Justice.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellants.

H. A. Hill and *H. Samuels* for respondent Stone.

Cyril King for respondents, the London Freehold and Leasehold Property Company, Limited.

Lawrence, J.: In this complicated case I regret to find that I am not in agreement with the commissioners. The question is, were the commissioners entitled to make additional assessments under sect. 125 on the facts of these cases, which I am going to deal with together, the first case being the case called Kliman against Stone, and the second being Hills against the London Freehold and Leasehold Property Company, Limited. The question whether they were entitled to make these additional assessments under sect. 125 depends upon the facts of the case, and upon the construction, principally, of the Finance Act, 1930, ss. 28, 31 and 32, and the Schedule to that Act. The most material facts in the first case, Kliman's case, which was outside the Metropolitan area, were these. In May, 1930, the hereditament came into existence for the first time. In Nov., 1930, the property was unoccupied. The importance of Nov., 1930, is that it is the date provided by the Schedule to the Finance Act of 1930 on which the assessors are to bring in certificates of their assessments of annual values. On Jan. 31, 1931, the hereditament was leased, and it is said that that lease could not be considered by the commissioners in making this additional assessment under sect. 125 They did not in that case make an assessment at all until Apr. 5, 1932, when they made an assessment in ignorance of the lease of Jan. 31, 1931. When the existence of that lease was discovered, the additional assessment was made under sect. 125, which is the reason for this appeal.

In the second case, which was inside the Metropolitan area, the most material facts were that the hereditament was subject to a lease dated May 5, 1921, to a Mr. Barrett for a term of 10 years, from Dec. 25, 1920, at a rent of £180 per annum; and on Jan. 30, 1930, whilst that lease was still running, Mr. Barrett made a return under the Valuation (Metropolis) Act, 1869. On Aug. 20, 1930, Mr. Barrett made an agreement with his lessors to continue his tenancy for one quarter from Dec. 25, 1930, the date when the original lease ran out, to Mar. 25, 1931, at a rent of £100 for the quarter. On Apr. 24, 1931, the premises were let by the respondents to a Mr. Denty for a term of 21 years from Mar. 25, 1931, at a rent of £300 per annum, increasing to other figures. On Aug. 10, 1931, the inspector made his assessment, and on Aug. 18, 1931, the assessment was allowed. The assessment was made in ignorance of Mr. Barrett's agreement of Aug. 20, 1930, and in ignorance of the lease of Apr. 24, 1931, and it was allowed in ignorance of those facts. When those facts came to light, additional assessments were made under

sect. 125, and those are the additional assessments which are now challenged.

The respondents' contention in the first case is that the commissioners were not entitled to take into account the lease of Jan. 31, 1931, because it was not in existence in Nov., 1930, which was the date, as I have already said, on which the assessors were bound, in that particular year, to bring in certificates of their assessments of annual value, the fundamental contention being that the date fixes the time at which the annual value has got to be determined, and that no facts or circumstances which happened after that date can be considered for the purpose of arriving at the assessment, either by the assessors or by the surveyor of taxes, or by the inspector of taxes, or by the commissioners who sign and allow the assessment ; so that in the first case the respondents tie themselves to the date of Nov. 30, and I suppose that their reasoning would apply in future years to July 20, which is the date at which the assessors are to bring in certificates of their assessments of annual value.

In the next case, the respondents contend that Mr. Barrett's agreement of Aug. 20, 1930, and the lease of Apr. 24, 1931, not being in existence when Mr. Barrett made his return on Jan. 30, nor being in existence on Apr. 6, 1930, when the preparatory year began, neither that agreement nor that lease can be taken into account for the purpose of arriving at the annual value in that case. Now, in my view, there is no ground for these contentions because there is nothing explicit or express in the statutes which provides that the assessors or the surveyor, or the inspector, or the commissioners, must put out of consideration every circumstance which happens after the date of the return by a tax-payer, in the case of the Metropolitan area, where he makes a return under the Valuation (Metropolis) Act, 1869. There is nothing express in the statutes which prevents the commissioners and the other officials from taking into account circumstances which have happened since those times. In my opinion, if they are relevant, they may be considered by the commissioners when they are making their original assessments, when they are signing and allowing the original assessments under the 1918 Act, s. 120, and when they are making additional assessments under the 1918 Act, s. 125, at any rate, provided that they arise or happen during the year of revaluation. It is not necessary for me to decide whether they can take into account facts which happen after the year of revaluation if relevant, but if they arise, as they did arise in the first case, during the preparatory year, and in the second case one of the circumstances arose within the preparatory year, and the second arose within the year of revaluation, in both those cases I hold that they can, and ought to be taken into account by the commissioners. It was contended by Mr. King, in particular, that the provisions of sect. 28 (2), indicate that the valuation has got to be for the preparatory year, and

that the words "so far as may be," refer to cases where there may be no hereditament in existence, and he contended, as I understood his argument, that the Valuation (Metropolis) Act, 1869, fixes Apr. 6 as the date at which the valuation has to be taken, and that the provisions of the Finance Act, 1930, s. 32, contemplate that that same date is the date which has got to be taken for the purposes of income tax; but, in my view, all that the Finance Act, 1930, does with reference to the Valuation (Metropolis) Act, 1869, is to provide that the valuation list arrived at under that Act shall cease to have conclusive force, and merely to provide by sec. 32, that the return made by the ratepayer under the Valuation (Metropolis) Act shall be transmitted to the surveyor of taxes, and that where it has been transmitted and contains all the particulars necessary for making a correct assessment to income tax in respect of the annual value of the property to which it relates, it shall be deemed to be a statement of the annual value for the purposes of assessments under the Income Tax Act, 1918, Scheds. A and B. In my opinion, that was not intended to introduce any part of the provisions of the Valuation (Metropolis) Act, 1869, except to make this return usable if it contained the particulars necessary for making a correct assessment, and it leaves untouched the other provisions of the Income Tax Acts in which, as I have said, there appears to me to be nothing which prevents the commissioners from considering facts which arise after Nov. 30 in the preparatory year, and after the preparatory year itself has elapsed, and at any time within the year of revaluation.

For these reasons, I am of opinion that these additional assessments, under sect. 125, were properly made, and as the facts which were then discovered and brought to the notice of the commissioners were, in my judgment, clearly relevant, and were, as I am told, unanswered, it does not seem to me that it is necessary to send the matter back to the commissioners. I think the proper course is to allow the appeal with costs in each case.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Bennett & Bennett* (for the respondent, Stone); *Henry Gover & Son* (for the respondents, the London Freehold and Leasehold Property Company, Limited).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

DE JETLEY MARKS *v.* GREENWOOD (LORD) AND OTHERS.

[KING'S BENCH DIVISION (Porter J.), **March 16, 1936.**]

Tort—Conspiracy—Directors conspiring to secure dismissal of managing director.

The plaintiff was managing director and the defendants were the chairman and other directors of a limited company which was incurring heavy losses. The plaintiff had urged that an investigation should be held to inquire into the reasons for these losses, but no investigation was then held. The plaintiff was compelled through ill-health to leave England. The defendants at a board meeting, thinking that the company's poor financial position was due to the plaintiff's mis-management, suspended him from his duties and proposed the holding of an investigation. A report hostile to the plaintiff was duly made by the investigator. The plaintiff's salary had been paid after his suspension, but on one occasion no payment was made as the company thought it had an account against him amounting to more than the sum due to him. The plaintiff was not told why no payment had been made. He thereupon wrote to the company demanding to know within two days whether he had been dismissed. On receiving no satisfactory reply, the plaintiff issued a writ against the defendants for damages for wrongfully conspiring to procure a breach of his contract with the company. He also resigned his directorship :—

HELD : (i) on the evidence the plaintiff had never been dismissed.

(ii) a conspiracy to cause a breach of contract is not in itself good cause of action. The intended breach is an integral part of the cause of action and must take place before the writ is issued.

(iii) directors in a board meeting cannot induce or conspire to induce that meeting to break a contract, though some may before such meeting so conspire.

(iv) the action of those who induce others to break their contracts can only be justified where such action is taken as a duty.

[**EDITORIAL NOTE.** This case discusses the question of company directors conspiring together to secure the dismissal by the company of one of their number. The view the learned judge has taken of the facts has prevented some aspects of the matter being fully explored ; but the judgment includes an interesting examination of the legal results of a conspiracy to cause a breach of contract. Such a conspiracy in itself is said not to be a cause of action unless the intended breach of contract results from it. From this it follows that in an action based upon such a conspiracy the writ must not be issued before the breach of contract has resulted, and in that respect, the writ in the present action was premature.

As TO CONSPIRACY, see HALSBURY, 1st Edn., Vol. 27, Tort p. 489, para. 958, and Trade and Trade Unions, pp. 638-644, paras. 1195, 1196; and FOR THE CASES, see DIGEST, Vol. 43, pp. 112-118, Nos. 1171-1227.]

Cases referred to :

(1) *Lumley* v. *Gye* (1853), 2 E. & B. 216 ; 42 Digest 987, *169*.

(2) *Quinn* v. *Leathem*, [1901] A.C. 495 ; 43 Digest 112, *1179*.

(3) *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208 ; 12 Digest 340, *2838*.

(4) *Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434 ; 12 Digest 339, *2835*.

(5) *Said* v. *Butt*, [1920] 3 K.B. 497 ; 42 Digest 986, *167*.

(6) *Scammell, G. and Nephew, Ltd.* v. *Hurley*, [1929] 1 K.B. 419 ; Digest Supp.

(7) *Brimelow* v. *Casson*, [1924] 1 Ch. 302 ; 43 Digest 115, *1194*.

(8) *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239; 43 Digest 114, *1186*.
(9) *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K.B. 88; 43 Digest 116, *1204*.
(10) *Pratt* v. *British Medical Association*, [1919] 1 K.B. 244; 43 Digest 113, *1180*.
(11) *Sorrell* v. *Smith*, [1925] A.C. 700; 43 Digest 113, *1183*.
(12) *Ware & De Freville, Ltd.* v. *Motor Trade Association*, [1921] 3 K.B. 40; 43 Digest 124, *1264*.
(13) *National Phonograph Co., Ltd.* v. *Edison-Bell Consolidated Phonograph Co., Ltd.*, [1908] 1 Ch. 335; 42 Digest 988, *177*.

Action for damages for wrongfully and maliciously conspiring to procure a breach of the plaintiff's contract of employment with the United Egg and Poultry Packers, Limited. The facts and arguments are fully set out in the judgment.

D. N. Pritt, K.C., F. Hallis and *J. E. S. Ricardo*, for the plaintiff.

Norman Birkett, K.C., and *F. W. Wallace*, for the defendants.

Porter, J.: The plaintiff, in Sept., 1930, started business as a poultry farmer, a business of which hitherto he had had no experience. Early in 1932, at the suggestion of the Ministry of Agriculture, he started, in addition, a packing station, grading and selling of National Mark eggs, and carried on this business until June, 1933, by which time his turnover was some five to six million eggs per annum. In this business he was joined by two gentlemen whose names were Emery and Pemberton, and in that month a private company was formed by these three persons called The United Egg and Poultry Packers, Ltd., to which the plaintiff's business was sold for £1,780, the capital of the company being £10,700.

The defendant, O. F. Rowntree, was introduced to the plaintiff in April or May, 1933, and became one of the directors of the company. The company was actually worked by the plaintiff, Emery and Pemberton, and a new packing station was built. This station was officially opened in Sept., 1933, by the defendant, Lord Greenwood, who was introduced to the plaintiff by O. F. Rowntree. At or about the same time the plaintiff, also through O. F. Rowntree, became acquainted with the defendants, Manthorpe and O. W. Rowntree, who was O. F. Rowntree's son, and with a Mr. Lees-Smith, who was at that time secretary of the Commercial Traveller's Benevolent Association, and afterwards became secretary of the United Egg & Poultry Packers, Ltd. Shortly afterwards, the plaintiff became interested with Mr. O. F. Rowntree in a property known as Southwood Park Farms which was taken over in Sept., 1933, by a company known as Southwood Park Farms, Ltd., and himself conducted a business known as Country Egg Shops, Ltd. Southwood Park Farm was intended to be used for the production of eggs; Country Eggs Shops were buyers and distributors.

The defendant, Manthorpe lent £1,200 to Southwood Park Farms that they in turn might lend it to Country Egg Shops under an agree-

ment, by one of the terms of which he was elected a director of United Egg & Poultry Packers, Ltd., in Oct., 1933. In Sept., 1933, O. W. Rowntree became manager of the farm at Southwood Park and a director of the company. By the end of 1933, the new buildings of the United Egg & Poultry Packers, Ltd., were finished, and the directors were looking round for further capital, and eventually by the middle of 1934, O. F. Rowntree had persuaded the defendant, Lord Greenwood, to take an interest in the company. Lord Greenwood had some interest with the Prudential Assurance Co., Ltd., and induced them actively to assist the company. After a full investigation undertaken on their behalf, the Prudential Assurance Co. agreed to take up shares to the value of £33,000 in an enlarged public company whose articles were adopted by a special resolution passed on May 11, 1934. It was part of the scheme that Lord Greenwood should become chairman and Manthorpe a director of the new company; that Southwood Park Farms, Ltd., should be taken over, the new company becoming owners of the property on condition that they took over the assets and paid the liabilities of Southwood Park Farms, Ltd., and that the aim of the enlarged company should be to reach a turnover of fifty million eggs a year. About the same time O. W. Rowntree was elected a member of the Board of United Egg & Poultry Packers, Ltd., at the suggestion of his father, and Lees-Smith on the recommendation of O. F. Rowntree was appointed secretary and manager at a salary of £700, plus commission. This appointment was formally confirmed on July 6, 1934, and at the same time O. W. Rowntree was engaged as an egg buyer at a salary of £500 a year, and the plaintiff managing director at a salary of £1,200 payable monthly plus commission. The plaintiff alleges that the company broke this agreement, and sues the defendants in this action for conspiracy in inducing the company to do so. The plaintiff maintains that O. F. Rowntree's mind began to be inflamed against him some months before this agreement was signed. I find that no serious disagreement occurred between them or any of the directors up to Sept., 1934.

Preparations for a large increase in the business were begun by the plaintiff, and on Aug. 14, 1934, he submitted a scheme to the board. In Sept. the plaintiff went abroad for a holiday. Meanwhile O. W. Rowntree had begun his duties as egg buyer on July 1, and on the suggestion of O. F. Rowntree—a suggestion in which the plaintiff ultimately concurred—a Mr. O'Donnell had been appointed accountant of the company and entered their employment on Aug. 27. It is plain that from the start O. W. Rowntree was unsuccessful as an egg buyer. His duty was to obtain contracts with local farmers, but during the whole of this period he did not succeed in obtaining any. Meanwhile, however, the plaintiff was negotiating with a group of farmers in East

Anglia who carried on business as Norfolk Egg Producers, Ltd.; and on Aug. 13, he had obtained from them the offer of a contract for fifteen million eggs per annum for two years. This offer was accepted by the United Egg & Poultry Packers, Ltd., on Sept. 28, and deliveries under the contract began in Oct.

By Sept. 17 O. W. Rowntree had still failed to secure any contract for eggs, and on that day an informal meeting of O. F. Rowntree, O. W. Rowntree, Lees-Smith and O'Donnell was held; the question of the terms to be offered to local farmers was discussed, and it was determined to allow an increased price pending the holding of the next board meeting. The plaintiff returned on Sept. 20, complained of this resolution (which no doubt would have led to difficulties with the farmers who already had contracts with the company) and recommended the resignation of O. W. Rowntree as egg buyer, and the review of his position as director. The matter was raised and discussed at a board meeting held on Sept. 28, 1934. At that meeting the resignation of O. W. Rowntree as egg buyer was tendered and accepted. It is said by the plaintiff that this incident further inflamed O. F. Rowntree's mind against him and that he was abusive. I find that he was abusive, and both his and his son's minds were inflamed, but I do not find that Manthorpe was influenced by the plaintiff's action. During this period and up till after the end of the year the company was incurring a loss from month to month, and its overdraft at the bank was raipdly increasing. The plaintiff maintained that in an expanding business an increasing overdraft was inevitable if the company was to keep faith with the Prudential Assurance Company and reach a turnover of 50 million eggs a year, and that the company's losses were due to the failure of O. W. Rowntree to buy locally, to injudicious selling—that is, to selling wholesale on consignment—and to selling too soon on a rising market and too late on a falling one. Acting on this view he withdrew Lees-Smith's powers as manager at the end of Oct., and himself undertook the selling of the eggs. The defendants, on the other hand, maintained that the loss was due to an expansion of business too quickly achieved without considering the possibilities of obtaining the necessary finance and to purchases and particularly to purchases from the Norfolk Egg Producers at unremunerative prices. It is not necessary for me to resolve this conflict, but I find that each of the defendants genuinely, and the plaintiff passionately, believed in his own contentions. At the time no doubt the defendants had not formulated even in their own minds the causes to which they attributed the position of the company. All they knew was that the overdraft of the company was rapidly increasing, and that so far from earning the profits which the plaintiff in Apr., 1934, had estimated they could earn, it appeared to be continuously operating at a loss.

Like the defendants, the plaintiff was at this time and after disturbed

at the failure of the company to make net profits. He had at the board meeting on Nov. 2, 1934, suggested that one cause of this was the selling of eggs to the wholesale trade which did not show a profit, and stated that he proposed to make drastic alterations. He does at this period appear to have taken from Lees-Smith his power as manager and to have himself undertaken the selling of eggs, leaving the buying, or at any rate the local buying, for future attention.

By the next board meeting on Dec. 7, the financial position of the company had not improved; the two months ending Nov. 30 showed on the accountant's figures a net loss of £1,196, and the overdraft on the general account was £7,549, though the credit balance on the egg account was £565. The directors generally were dissatisfied and the plaintiff was urging that an inquiry be held.

The plaintiff being dissatisfied, inasmuch as no inquiry had taken place, sent a report to the chairman, dated Dec. 19, 1934. In the report he again recommended that an investigation be made into the points raised. He suggested that the Prudential Assurance Co. should undertake the task, and that on their findings action should be taken through the medium of a general meeting. Lord Greenwood took no action on this report. He stated that he regarded it as a mere wild attack, more particularly in view of the plaintiff's claim that he had put the company on a satisfactory basis, which Lord Greenwood regarded as contradicted by its financial position.

During the month of Jan. the plaintiff's health grew steadily worse, and on Jan. 8, 1935, he wrote to Lord Greenwood, saying that his doctor recommended treatment in a London nursing home or in a sanatorium abroad. On Jan. 10 a board meeting was held, and I find that the question of the plaintiff's health was mentioned before the meeting to Lord Greenwood and O. F. Rowntree, and at the meeting itself to the board. No objection was taken, but I do not think that the urgency of the matter was fully present to the minds of the defendants. At this meeting the accounts up to Sept. 30, 1934, were handed to Lord Greenwood by Lees-Smith. The plaintiff had had no opportunity of examining these accounts, and though a copy was directed to be sent to each director, the plaintiff never received his copy, because the secretary sent it to the company's Basingstoke office. At this date the company had an overdraft of £10,000 and the net loss during the last month was £730.

The next board meeting was fixed for Jan. 17. Before it was held the plaintiff had had his teeth removed on Jan. 12 and had written to Lord Greenwood on Jan. 15, pointing out that his doctor had forbidden him to work for a month or six weeks and asking for approval of a Mr. Anderson as substitute director. Meanwhile, O. F. Rowntree had been endeavouring to persuade Lord Greenwood to see Emery and Pemberton, stating that he had no faith in the plaintiff, and that he had information

concerning him which, if true, would mean his leaving the country at an early date. O. F. Rowntree explained this last observation was a reference to the plaintiff's health; but part of his case was that he did not think that the plaintiff was ill, and in any case I do not accept his explanation. In a letter of Jan. 16, Lord Greenwood agreed to see Emery and Pemberton before the board meeting on the 17th, and added: "I have had a letter from the plaintiff. He will be unable to attend to-morrow. I am sure he is very ill." At the meeting the plaintiff's letter was read and his request for a substitute director refused. At this meeting a further board meeting and the annual general meeting were fixed for Jan. 30. Before either was held the plaintiff was visited on Jan. 23 by Manthorpe and afterwards by O. F. Rowntree and O. W. Rowntree. I find that at that interview Manthorpe did try to persuade the plaintiff to stay for the general meeting, but neither O. F. Rowntree nor O. W. Rowntree discussed the question of the plaintiff's presence, either at the board meeting or the general meeting. I also find that the plaintiff was genuinely ill and advisedly left this country on Jan. 25, 1935. The two Rowntrees were, I find, glad to be rid of him at any cost, but Manthorpe thought him well enough to stay for the general meeting.

Before that meeting was held, Lord Greenwood and Manthorpe had determined to propose that an investigation into the affairs of the company be held and that in the meantime the plaintiff be suspended from his duties. Lord Greenwood had gradually come to believe this step necessary, and was confirmed by his view of the report of Dec. 19, 1934. He had already by Jan. 28 consulted the company's bankers and had been given the name of an accountant by them. Manthorpe had also gradually determined on this course. He had written down a proposal for the suspension of the plaintiff and for an inquiry and given his reasons for the proposed suspension, but had met Lord Greenwood before the meeting and agreed to adopt a resolution giving the plaintiff's absence without leave as the reason for the board's action. At the meeting itself, Lord Greenwood's resolution was adopted, an investigation by the bank's nominee, Mr. Fairbrother, determined upon and the plaintiff suspended from his duties. I find that Lord Greenwood and Manthorpe genuinely believed the company to be in a critical position and the plaintiff to blame, that they expected the investigator would find him to blame but at that time they had neither conspired nor determined to induce the company to dismiss him. They thought that the report would be adverse, but intended to await the result and give the plaintiff a hearing before putting it into force. They did not intend to have the plaintiff dismissed or his contract terminated unless after due inquiry they thought they were legally entitled to do so, or at any rate they thought it in the company's interest to do so, even at the expense of having to pay the plaintiff compensation. O. F. Rowntree and O. W. Rowntree, on the

other hand, were, I think, quite prepared to assent to the dismissal of the plaintiff on any or no grounds, unless it would cost the company too much to do so ; but I think they also thought the company's losses and its financial stringency were due to the plaintiff's fault.

Before the board meeting and general meeting of Jan. 30 were held, the plaintiff had gone abroad, leaving no address. I accept his evidence that he did not know where he was going, and that in any case it was desirable that he should not be troubled with business affairs ; but as events turned out, it was unfortunate that he failed to communicate his address to the company. It is true that both his secretary and the housekeeper knew within a week or so where he was to be found, but by that time they were (as he was) firmly convinced that a conspiracy was on foot and, perhaps naturally enough, refused to reveal that they knew. One consequence of the plaintiff's suspension was that Lees-Smith was put in general control of the business and O. W. Rowntree was directed to give general assistance at Basingstoke, for which he was paid £5 per week. The plaintiff was duly informed of the resolution of the board, and Mr. Fairbrother, after asking some preliminary questions, began his inquiry proper on Feb 11, and finished it on March 5 I find that Lees-Smith, O. F. Rowntree, O. W. Rowntree and O'Donnell all told Fairbrother that the plaintiff was away and not available. His illness was not mentioned. All those persons hoped they had got rid of him, but were not certain and were not anxious for his return before the inquiry was finished. Manthorpe, on the other hand, was convinced that the report must be unfavourable and had assumed that the plaintiff had gone for good and so expressed himself to Miss Wilson, the plaintiff's secretary. Lord Greenwood, I find, left the investigator to take his own course as to the method of investigation. I think he realised then that probably the plaintiff would not be present as he certainly realised later that he had not been present. The rest of the defendants, as well as Lees-Smith and O'Donnell, knew and intended that the plaintiff should not be present ; Manthorpe because he regarded the matter as a dispute between the managing director and the other directors and saw no reason why, if the other directors did not give their version of affairs, the plaintiff should give his ; the others because they were unwilling for the plaintiff to be present. Mr. Fairbrother finished his report on March 25, 1935. In it he came to a conclusion hostile to the plaintiff. He himself took the view that no explanation given by the plaintiff would have made any difference to this result.

The plaintiff returned to this country on Feb. 18. He did not know whether the inquiry was over or not until the latter part of March and he received a copy of the report on 27th. The plaintiff's monthly salary was paid and accepted on Feb. 1. On Feb. 28, however, the plaintiff issued a writ against the company for arrears of salary before the

formation of the public company and for wrongful dismissal. Before appearance was entered, the plaintiff's salary for February had been paid and accepted and in answer to the writ, the company's solicitor wrote on Mar. 4, stating that the plaintiff had not been dismissed, but merely relieved of his duties pending an independent investigation. The claim for wrongful dismissal was thereupon abandoned. On Mar. 6, 1935, the plaintiff wrote to Lord Greenwood, who had returned to England on the previous day, as chairman of the company, stating that he had abandoned the claim for wrongful dismissal and pointing out that the company still regarded him as managing director.

Fairbrother's report was received by Lees-Smith on Mar. 27, 1935, a copy sent to each director, excluding the plaintiff. This action on the secretary's part was deliberate and was, I find, done because he did not wish the plaintiff to see the report before the board had discussed it. I do not accept the explanation given by Lees-Smith that there were only five copies and he wanted one for himself. In expectation, I surmise, of the receipt of the report, a board meeting had been called for Apr. 4, 1935. At that meeting Mr. Fairbrother's report was presented. In it he had stated that the plaintiff owed the company £629, and it was accordingly determined not to pay the plaintiff's March salary, not because it was not due, but because it was believed that the company had an account against him overtopping his claim. It was also decided to hold the next board meeting on Apr. 11 and to inform the plaintiff that the investigation had been completed and that as matters relating to him would be raised perhaps he would like to attend the meeting. This was the first notice of any board meeting which was sent or which anyone had suggested should be sent to the plaintiff since that delivered to the offices of the company announcing the meeting of Jan. 30. The failure to send notices was a gross irregularity, and if anything turned on the validity of the board meetings held, might have serious consequences. But even the suggested notice was not sent, as the meeting was postponed, first, until Apr. 16 and eventually to May 17 to suit the convenience of Lord Greenwood. Even though the meeting was postponed, the letter might still have been sent. Lord Greenwood says he cancelled it because of the writs issued by the plaintiff, particularly that of Feb. 28. I can see no reason why a writ, already known on Apr. 4 to be in existence, should have affected the chairman's mind after that date but not on that date itself. Next day, Apr. 5, the plaintiff had not received his salary for March, issued a fresh writ, and I think it was this writ and the existence of further litigation that somewhat illogically made Lord Greenwood postpone sending the letter. Before the meeting of May 17, the plaintiff had already issued his writ in this action and the suggestion of summoning him to a meeting was cancelled.

The plaintiff, who had received a copy of the report through one of the

servants of the company without the knowledge of the defendants and had heard nothing further about it or his position, wrote to the secretary of the United Egg & Poultry Packets, Ltd., on Apr. 23, demanding to know whether he had been dismissed or not, and saying that if he did not receive an answer by noon in London on the 25th he would assume that his contract had been terminated. To this letter the secretary replied on the 24th that he had no instructions from his board, and on Apr. 25 the plaintiff issued the writ in this action against his four co-directors for damages for wrongfully conspiring to procure a breach of his contract with the United Egg & Poultry Packers, Ltd. To complete the story, the plaintiff very ill-advisedly in his own interests, as I think, resigned his directorship of the United Egg & Poultry Packers on May 21, 1935, and if his contract was not already broken thereby, himself put an end to his managing directorship. The resignation was received by the secretary in due course and put by him on May 23 before what purported to be a board meeting to which only the two Rowntrees were summoned. No notice of the meeting was sent, no quorum was present and it was quite irregular. If anything turned upon it, I should hold it invalid. It is obvious that the Rowntrees jumped at the opportunity of getting rid of the plaintiff.

In these circumstances I have to determine whether the plaintiff has made out his case. I do not think he has: I do not think that either Lord Greenwood or Manthorpe had by Apr. 25, 1935, made up their minds whether they would vote for the dismissal of the plaintiff or not. Mr. Fairbrother had warned them in his report that the plaintiff's contract still subsisted, and though I find that neither expected the plaintiff to give any valid answer to Mr. Fairbrother's finding, yet I find that they intended to give him the opportunity of being heard and would have hesitated before committing a breach of contract. O. F. Rowntree and O. W. Rowntree would have gladly broken the plaintiff's contract if they dared. They had done their best to prevent the plaintiff's views from being put before Mr. Fairbrother in the hope that his report would induce their fellow directors to get rid of the plaintiff. I do not find that they had taken direct steps to induce the company to break his contract; but they had conspired to withhold the plaintiff's case from Mr. Fairbrother in the hope that he might find reasons for recommending the company to dismiss the plaintiff. If they had been successful this might well have amounted to a conspiracy; but in my view the plaintiff was never dismissed. At the date of the writ, the company, through its directors, was, I think, still undetermined whether to dismiss the plaintiff or not. In terms they had not dismissed him; indeed they have asserted that he was still the managing director.

It was suggested on behalf of the plaintiff that to suspend a servant of the company, part of whose remuneration was by way of commission,

was itself a dismissal, since it took from him the opportunity of earning commission, even though it would have been long before any commission could have been earned, and that in any event the long delay in deciding the plaintiff's fate, coupled with the failure to pay his March salary, was such a breach of contract as the plaintiff could accept as a dismissal. Whatever the true view of these submissions in another case, I think that here (i) the company had expressly informed the plaintiff that it had not dismissed him, (ii) the plaintiff by accepting his February salary and suing for his March one, had affirmed the existence of the contract up to the end of March, (iii) by so doing the plaintiff had elected to treat his suspension as not in itself a breach of contract, at any rate, unless and until he gave reasonable notice to the company that unless he was reinstated he would treat the suspension as a breach. I do not think that to give two days' notice at most to any company, and particularly to a company whose directors must take some time to collect at a board meeting, is a reasonable notice, and I think that no actionable breach had taken place by Apr. 25, 1935. It is true that to induce or conspire to induce a third party to put an end to a contract without lawful excuse is an actionable wrong: *Lumley* v. *Gye* (1), *Quinn* v. *Leathem* (2). But not every breach puts an end to the contract; it must be such a breach as goes to its root or shows an intention in the party sued not to be bound by it: *Freeth* v. *Burr* (3), *Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.* (4). In my view the company never showed any intention not to be bound by the contract nor did their breach, if it were one, by suspending the plaintiff from his duties as managing director, amount to a repudiation.

It was further contended that the cause of action was the conspiracy and that, even though the breach occurred after the writ was issued, the plaintiff had a good cause of action, provided the breach was induced by the defendants. I do not agree. The breach is, I think, an integral part of the cause of the action and must take place before the issue of the writ. But, in any case, in my opinion, the plaintiff was never dismissed; he dismissed himself by his ill-advised resignation from his directorship on May 21. This view is decisive of the action; but in case I should have come to the conclusion that there was a wrongful dismissal by the company, Mr. Birkett argued that the servants or agents of a company could never be guilty of conspiracy to dismiss one of the company's servants. As supporting this contention he cited *Said* v. *Butt* (5) and *Scammell* v. *Hurley* (6). There is force in this argument, and I think it is true that directors in a board meeting could not induce or conspire to induce that meeting to break a contract—at any rate, not without malice. But I think that some at any rate, if not all, of the directors could conspire, before the board meeting was held, to induce the board as a whole wrongfully to break a contract by dismissing one of the

company's servants. The matter, however, is a difficult one and I prefer to express no final opinion upon it.

Apart from these two defences, Mr. Birkett asked leave to amend his defence in two respects, (i) in order to plead that the defendants had good cause to induce the company to break its contract with the plaintiff, which amendment I allowed, and (ii) in order to plead that the defendants were justified in dismissing the plaintiff owing to his conduct as managing director. This I refused. In my view the defendants avoided putting forward this latter plea, or at least omitted to do so, in a case where it would have been imprudent to join a plea of non-dismissal with a plea of good cause to dismiss. But, though I allowed the former plea I do not think it is any advantage to the defendants. The good cause which excuses the procurement of a breach of contract must be something more than a belief by the servants or agents of a company that the company might become insolvent if the contract were not broken. To allow such cause to be sufficient would be to excuse the procurement of a breach where a breach itself could not be justified. Whatever be the ground upon which the action of those who induce others to break their contracts may be excused, I cannot find that they exist in the present case. The justification must, I think, involve an action taken as a duty, not the mere protection of the defendants' own interests. (See *Brimelow* v. *Casson* (7), *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (8), *Read* v. *Friendly Society of Operative Stonemasons* (9), and *Pratt* v. *British Medical Association* (10).

I understand Mr. Pritt to argue that, even if the plaintiff were not dismissed he still had a cause of action against the defendants on the principles set out in *Quinn* v. *Leathem* (2) and *Pratt* v. *British Medical Association* (10). The argument might involve the consideration of one of the most disputed topics in English law. On my finding some, at any rate, of the controversial questions do not arise, for example, the question of whether a combination of two or more persons is necessary to furnish such a cause of action, since I have found a combination of two. (See LORD DUNEDIN in *Sorrell* v *Smith* (11)). But enough and more than enough controversy remains. The action, it is true, only lies where illegal means are used. It is not enough that the motive of the act is bad. So much is common ground; but it is also true that acts done in the *bona fide* protection of the defendants' interests, if not themselves illegal, are not actionable(*Ware&de Freville, Ltd.* v.*Motor Trade Association* (12) and *Sorrell* v. *Smith* (11)). If, however, the object of the defendants is to injure the plaintiff and that result is brought about by illegal means, the plaintiff can sue for damage caused to him, at any rate where a conspiracy exists. Illegal means appear to include coercion, threats, intimidation and fraud. As to the last named see per KENNEDY, L.J.,

in *National Phonograph Co., Ltd.* v. *Edison-Bell Consolidated Phonograph Co., Ltd.* (13), at page 368.

I have found what I regard as the use of illegal means by O. F. Rowntree and O. W. Rowntree and a conspiracy by them ; but I have not found that their object was solely to injure the plaintiff. That was part of their object ; but they also desired to protect what they believed to be their interests, though they would have been willing to injure the plaintiff even if their own interests were not involved. What may result when the object is partly to injure the plaintiff and partly to protect the interests of the defendants is a question which Lord Sumner, in *Sorrell* v. *Smith* (11) found himself unable to solve and which in this case I do not find it necessary to determine. In truth, whether the plaintiff complains that he is injured by the breach of an existing contract or by the inability to obtain future contracts, damage is the gist of the action. In the present case the damage is not an inability to obtain contracts, but the breach of one already in existence. In my view, the argument takes the plaintiff no further. The action of the two defendants O. F. Rowntree and O. W. Rowntree has caused him no damage ; they neither succeeded in inducing the company to dismiss him, nor did they prevent the company entering into a further contract with him. If any complaint was possible it would be for his alleged dismissal and for nothing else.

If I am wrong, I assess the damages at £3,500, either against all the defendants or the defendants O. F. Rowntree and O. W. Rowntree as a higher court may direct, but as it is I give judgment for the defendants with costs ; except that O. F. Rowntree and O. W. Rowntree receive no costs.

Solicitors : *Theodore Bell, Cotton & Curtis* (for the plaintiff) ; *Morris, Ward-Jones, Kennett & Co.* (for the defendants).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

Re THE DEBTORS (No. 836 of 1935), PETITIONING CREDITOR *v.* THE DEBTORS.

[COURT OF APPEAL (Lord Wright, M.R., Romer, L.J., and Charles, J.), **April 3, 1936.**]

Bankruptcy—Foreign debtor carrying on business abroad and in England by agent—Assignment for benefit of creditors operating according to foreign law.

The debtors carried on a business of private bankers at various places abroad, as well as in London. The agent in London realised the English assets and paid the English creditors in full. A Belgian creditor then brought bankruptcy proceedings in England, relying upon two acts of bankruptcy: (*a*) a conveyance for the benefit of creditors of the debtor's property executed in New York according to the local law; and (*b*) the absenting of themselves by the debtors from their place of business in Paris upon a certain date. As to (*b*), it was necessary to amend the petition as to the date and this the registrar in the exercise of his discretion refused:—

HELD: (i) a conveyance for the benefit of creditors operating according to foreign law is not an act of bankruptcy.

(ii) the court must be strict in bankruptcy matters and the exercise of his discretion by the registrar here made would not be interfered with.

[**EDITORIAL NOTE.** The position of an assignment for the benefit of creditors operating according to foreign law is dealt with in DICEY CONFLICT OF LAWS, 5th Edn., pp. 313, 314. The learned author finds a difficulty in reconciling the limitation upon the act of bankruptcy and the definition of debtor in the Act. This passage is dissented from in the judgment of LORD WRIGHT, M.R., and he states expressly that the definition of debtor in the 1914 Act has not over-ruled the cases of *Ex p. Crispin* (1873), 8 Ch. App. 374; 4 Digest 25, *196*, and *Cooke* v. *Vogeler*, [1901] A.C. 102; 4 Digest 25, *199*.

AS TO ASSIGNMENTS FOR BENEFIT OF CREDITORS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 16, 17; and FOR CASES, see DIGEST, Vol. 4, p. 25, Nos. 195-200.]

Cases referred to:

(1) *Cooke* v. *Vogeler* (*Charles A.*) *Co.*, [1901] A.C. 102; 4 Digest 25, *199*.

(2) *Re Crispin Ex p. Crispin* (1873), 8 Ch. App. 374; 4 Digest 25, *196*.

APPEAL from an order of the registrar, dismissing the petition in bankruptcy of the appellant.

The debtors, B. C. and G. W., were American citizens who carried on the business of a private bank and financial agency in Paris, Amsterdam, Brussels and London. The petitioning creditor was a Belgian national, Albert Mund, whose debt was for £250. There were said to be a number of other Belgian creditors, whose debts amounted to some £40,000. The head office of the debtors business was in Paris, where they resided. The London office was under the control of one D. as manager. On July 17, 1935, D., as was his usual practice, telephoned to the head office but could get no reply. It subsequently appeared that B. C. and his brother had left Paris on that date. On the next day D. proceeded to realise the assets in London and distributed the proceeds to the English creditors, who were paid in full. The debts of the English creditors of the London branch amounted to £7,000. On

Aug. 5, the debtors then being resident and domiciled in New York, executed in accordance with the local law a conveyance or assignment of their property to a trustee for the benefit of their creditors. So far as G. W. was concerned this was limited to his partnership property.

Cyril Salmon for the appellant: The acts of bankruptcy relied on are: (*a*) conveyance by the debtors of their property to a trustee for the benefit of their creditors generally; and (*b*) absenting themselves from their dwelling-house and place of business in France on July 17, 1935. The Bankruptcy Act, 1914, has changed the law so as to override the decision of the House of Lords in *Cooke* v. *Vogeler* (1). In the Act of 1883 there was no definition of the word "debtor." The decision in that case only gave it a limited meaning and the whole decision is based on that word. The Act of 1914 changes the law in that it has defined a "debtor" as being any person who at the time the act of bankruptcy was done "was carrying on business in England, personally, or by means of an agent or manager." The debtors here come within this definition and therefore are not outside the scope of the English Bankruptcy Law. See Dicey Conflict of Laws, 5th Edn., page 313 (4).

Croom-Johnson, K.C., and *Reginald Goff* for the debtors, were not called upon:

Lord Wright, M.R.: This is an appeal from the registrar who dismissed the petition of Albert Mund, a Belgian, based on one or other of two acts of bankruptcy. The first is the conveyance in New York of the debtor's property to a trustee for the benefit of their creditors and the second attempting to delay their creditors on July 17 by absenting themselves from their address in Paris. Counsel for the appellants admits that this act cannot be relied on without amendment of the petition. The registrar has refused leave. He has exercised his discretion and this court sees no reason to interfere. We must act particularly strictly in a matter of bankruptcy.

As to the first act of bankruptcy relied on, the question is, is the conveyance an act of bankruptcy under the Bankruptcy Act of 1914? In sect. 1 (2) "debtor" includes:

> any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him: (*a*) was personally present in England; or (*b*) ordinarily resided or had a place of business in England; or (*c*) was carrying on business in England, personally, or by means of an agent or manager.

Clause (*c*) applies here because B. C. had an agent in England. So there is here a debtor within the Act who made a conveyance in New York. Mr. Salmon agrees that nothing more is necessary. But the question still remains of the assignment, which must be within the meaning of the section. I am clearly bound by *Cooke* v. *Vogeler* (1). The House of Lords held that the debtors in that case were not debtors

within the meaning of the 1883 Act. They also decided on entirely different grounds that the conveyance was not an act of bankruptcy.

The first ground would no longer apply since the 1914 Act, because it has defined "debtor," whereas the description in sect. 6 of the 1883 Act was merely negative. The deed of assignment, however, is the same as in *Cooke* v. *Vogeler* and is not an act of bankruptcy if it operates according to foreign law (HALSBURY, Hailsham Edn., Vol. 2, pp. 16 and 17). That was quite apart from the consideration of the word debtor. The Act of 1914 is the same as that of 1883 on this point—*Ex p. Crispin* (2). You cannot have an act of bankruptcy by a conveyance or assignment for the benefit of creditors intended to operate under foreign law. The definition of an act of bankruptcy has been the same under all the Bankruptcy Acts, and I cannot accept the opinion expressed in DICEY, 5th Edn., at page 313 (4), that the 1914 Act has rendered inapplicable the decision in *Cooke* v. *Vogeler*.

ROMER, L.J., gave judgment to the same effect, and CHARLES, J., concurred.

Solicitors : *Kenneth Brown, Baker, Baker* (for the appellants) ; *Gordon, Dadds & Co.* (for the respondents).

[*Reported by* C. ST. J. NICHOLSON, ESQ., *Barrister-at-Law*.]

IN THE ESTATE OF WRIGHT, LAMBERT *v.* WOODHAM.

[COURT OF APPEAL (Lord Wright, M.R., Romer, L.J., and Charles, J.), **March 20, 23, 24, 25, 1936.**]

Juries—Disagreement—Return of jury into court—Judge's direction as to duty to agree.

The jury, being unable to agree upon a verdict, intimated their inability to agree and returned into court. The learned judge thereupon directed them that in the interests of the parties, it was their duty to do their utmost to reach agreement, and if the minority could, without doing violence to a reasoned conviction, give way to the majority, they ought to do so :—

HELD : this was a proper direction, as it did not amount to a direction that the minority should, without being convinced at all, and without any real conversion, surrender their own judgment and agree with the majority.

[**EDITORIAL NOTE.** This case is the only occasion in modern times where the direction of a judge suggesting to a jury that they ought in the interests of the parties to use every effort to reach an agreement has been considered by the Court of Appeal. The matter for the jury's decision here was the testamentary capacity of a testatrix, and there being no dispute that there was some evidence of weakness of intellect, it was, as the learned judge said, only a question of degree. In such a case, the jury, it appears, ought to do their utmost to reach unanimity if the parties refuse to accept a majority verdict.

As to Disagreement of Jury, see HALSBURY, Hailsham Edn., Vol. 19, p. 316, para. 658; and for the Cases, see DIGEST, Vol. 30, p. 244, Nos. 425-428.]

Case referred to:

(1) *Everett* v. *Youells* (1833), 4 B. & Ad. 681; 30 Digest 244, *433*.

Probate Action in which a will was impugned on the ground that the testatrix was of unsound mind at the time of its execution. The jury failed to agree, and upon returning into court were thus directed by Langton, J.

Members of the jury, I understand you have great difficulty about this case. I am not at all surprised. I just want to put this matter to you for your further consideration. As the law of the matter is, and we have all understood it, I think, I hope so, it is a question of degree. What the condition of this lady's mind was, whether it was obscured, and how far it was obscured, it is a question of degree. I want you to consider it with that clearly in mind. It is not a question of a moral principle at all. Sometimes juries have to consider questions in which there is some moral principle involved and one understands that people are very slow to give way upon that, but it is not a question of moral principle, it is a question of degree. Therefore I am not for a moment saying that anybody ought to give way, but look at it from that point; it is a question of degree, and do not feel if there is a small majority—I have not the faintest idea what your majority is—that you have got some great moral principle behind you. You have not. You have got your own firm view. You might stick to it as a really strong view. It is not a matter that you ought to be disagreed about. You have got to realise that if you cannot come to an agreement about it the parties, certainly the defendants, have spent a tremendous lot of this estate and necessarily both parties have in litigating this, and it would be a terrible misfortune if they have to start all over again, so that you must try and see each other's point of view and bring your minds to it, and if there is anything like a large majority, the small minority could reasonably say to themselves: "It is a question of degree. I see no moral principle behind it; I do not feel very strongly about it. I feel it might be right and it might be wrong. I do not feel that I would be doing less than my duty in going in with the majority." I want you to see that point of view, that it is not a case of some tremendous moral principle where you must take an awful view about the question of degree. You have got to do the best you can, and if you have got a good strong majority the minority would not be doing any great violence to any moral principle if they saw their way to fall in with the majority. If I may use the words that Hill, J., used to be fond of quoting to juries: "A juror was heard to say after the case was over and there had been a disagreement: 'I never saw eleven more unreasonable people in my life.'" You have got to try and see the other fellow's point of view in a matter of this kind, and to do your very best to see it. A majority verdict will not do, the parties would not be satisfied, so you must give me a unanimous verdict. Do not feel too strongly about a matter which is a question of degree if you can fairly see that there is a great deal to be said for the other side. That is the only help I can give you. You are not entitled to do violence to your reasoned conviction. That is unfair to everybody, but make a real broadminded effort to see the other fellow's point of view in a case like this.

Upon appeal the appellants argued that such direction was wrong in law and an attempt to compel the minority to fall in with the majority and surrender their own view.

Maurice Healy, *K.C.*, and *H. D. Grazebrook* for the appellants.

Clifford Mortimer and *F. L. C. Hodson* for the respondents.

LORD WRIGHT, M.R. [His Lordship dealt with other points raised in the appeal.]

The real point which has been most laboured, and which I think calls for more careful attention, is what happened at the end of the trial. The jury retired at 11.43, and after an interval of time they sent in a note to the judge. That was at six minutes past one, something like an hour and twenty-three minutes after they had retired. It is unfortunate that that note was not read out in public, and that no copy of it was preserved, and what was contained in it is rather a matter of inference than of definite knowledge. But in the notice of motion this is said: "The jury after retiring to consider their verdict had intimated that they were not agreed and asked the learned judge to ascertain whether the parties would accept a majority verdict." I think that may be taken to express the nature and effect of the note. In that state of things the learned judge used the language which has been read a good many times, and which I am not going to read again, but I think in approaching that it is necessary to remember what he was doing. Before the jury came back into court learned counsel had told his Lordship that they were not going to accept a majority verdict and therefore the judge had to convey that information to the jury. That was the first point. Then he seems to have felt it his duty to do, what many judges have felt it their duty to do when there is a danger of disagreement on the part of the jury after a long and complicated trial. He felt it his duty to give them some advice as to the serious consequences to the various parties if there was a disagreement, and he seems to have desired to indicate that they ought, if they could, to come to a unanimous conclusion. The only question is whether in doing so he has not inadvertently told the jury that it was the duty of the minority to give up their independent judgment to that of the majority. In my judgment if he had charged the jury in that sense, that is to say, if he had told the jury as a matter of law, and as a definition of the duty of jurymen, that in order to avoid a disagreement the dissentient members who formed the minority should, without being convinced at all, without changing their minds at all, and without any real conversion, agree with the majority; and that they should surrender their own judgment in that way, in my opinion it would have been a misdirection. It would have involved giving the jury an incorrect view of their legal duty. Therefore the question which has to be determined here is whether the learned judge has done that. It is curious that this sort of question does not seem ever to have arisen. The only case which is referred to is one of *Everett* v. *Youells* (1). That is a most inconclusive case, but points were raised there by way of attacking the verdict of a jury. It

was in 1833, and the jurymen, according to the facts, had been shut up all night without food or refreshment, but somehow or another one of them had managed to have conveyed to him some sandwiches, and that was the first ground of objection to the jury's verdict. But it was also objected that the jury had "had an interview with the judge, who then observed to them on the subject of their verdict 'that concession ought to be made by the minority to the majority'; shortly after which they agreed to find for the defendant." The question of the delivery of food was passed aside, and the rule was refused on that point, but a rule *nisi* was granted on two of the grounds stated, one of them being an alleged misdirection of the learned judge, which was said to have influenced part of the jury. That I understand to refer to the alleged statement that concession ought to be made by the minority to the majority, and that is treated as a misdirection; that is to say, as a mis-statement of the law which the jury have to take from the judge, and on which they have to act. "Lord Tenterton at the same time observing that the statements on this point might, perhaps, go the length of showing that the verdict was not that of the whole jury; but that this would be a very dangerous ground to act upon in setting aside a verdict. The report of the learned judge was now read; by which it appeared that the expressions he had used were different from those ascribed to him." That matter seems to have come to an end, and then there was debated the other point which appears to have been raised, namely, that the verdict of the jury should not be treated as the verdict of the whole jury, because some of them said that they had been influenced by the charge of the learned judge and had abandoned their own view and merely concurred as a matter of form with the majority. There was some discussion, and the report says that they had had many affidavits but they could not receive statements from the jury to show on what grounds they acted. Then finally we have this: "The court, therefore, being of opinion that on the report there appeared no misdirection, nor any ground for saying that this was not the verdict of the whole jury; and that on the other point there was no reason for disturbing the verdict, the rule was discharged." That case does positively show that the language said to have been used by the learned judge was taken by a court of King's Bench to justify a rule *nisi* being granted, and it also shows that a charge of that sort is a misdirection. I need not refer to a number of cases on collateral points such as those cases that show that a compromise verdict would be bad, and some other authorities, and I shall assume what I think is the law, that if a judge does tell the jury that the minority must give in to the majority simply in order to avoid a difference of opinion, that is a misdirection in law.

Now what the judge said here does not, I think, amount to that at

all. He points out what he had already stated in his summing up, that the question at issue as to the state of mind of the old lady was a question of degree. He quoted the passage in which it was said that you may have the full daylight of sanity, you may have the darkness of complete insanity, or you may have the twilight stage, and no doubt having that in mind he then said "it is a question of degree; it is not a question of moral principle." By that, I think, he means that there is no question here of right or wrong involved, a question about which there could be no compromise or discussion at all. "Sometimes juries," he said "have to consider questions on which there is some moral principle involved, and one understands that people are very slow to give way upon that, but it is not a question of moral principle, it is a question of degree," and it must be remembered all the time that he is going to answer the question which he has not yet answered, namely, whether the parties will accept a majority verdict. Then he says: "I am not for a moment saying that anybody ought to give way." He says: "You have got your own firm view. You might stick to it as a really strong view," and then he goes on to say that this is not really a matter in which there ought to be a disagreement. He then points out the tremendous lot of expense and trouble involved if the case has to be all tried over again, and adds: "If there is anything like a large majority the small minority could reasonably say to themselves: 'It is a question of degree. I see no moral principle behind it; I do not feel very strongly about it. I feel it might be right and it might be wrong. I do not feel that I would be doing less than my duty in going in with the majority.'" Now that standing by itself would create in my mind a very considerable difficulty, but the charge of the learned judge does not stop there. He says: "You have got to do the best you can, and if you have got a good strong majority the minority would not be doing any great violence to any moral principle if they saw their way to fall in with the majority." That again is open, in itself, to very strong animadversion. Then there is a reference to the saying of Hill, J., with which I need not trouble, and then comes what I regard as an essential part of this charge. So far you have had phrases which might be turned in one direction and other phrases which might be turned in the other direction, and then you come to this, which I think was the critical passage in the charge, and it is in this passage that the learned judge answers the question and tells the jury that the parties will not accept a majority verdict. He says; "You have got to try and see the other fellow's point of view in a matter of this kind, and to do your very best to see it." Then he says, which is the fact: "A majority verdict will not do, the parties would not be satisfied, so you must give me a unanimous verdict." That is answering the question, not telling them that it is the duty of the jury whatever their convictions somehow

to concur in a majority verdict. He is telling them that the parties will not have a majority verdict and that they must do their best to see whether they cannot come to an agreement. He says: "Do not feel too strongly about a matter which is a question of degree if you can fairly see that there is a great deal to be said for the other side. That is the only help I can give you. You are not entitled to do violence to your reasoned conviction. That is unfair to everybody, but make a real broadminded effort to see the other fellow's point of view in a case like this."

Now, the view I have formed on reading this charge as a whole is that the learned judge is admonishing the members of the jury that they ought not to be obstinate; that they ought all to try to pool their views and see whether by the ordinary process of discussion they cannot arrive at a common conclusion. I do not see anything wrong in that, and I do not think, if that is the true effect, as I think it is, of the learned judge's statement to the jury at this point, that it can be treated as a mis-direction or a mis-statement of the law. I am bound to say that there are one or two phrases (to which I have already drawn attention) which are somewhat unfortunate. Judges are often moved to urge a jury to avoid a disagreement if they can reasonably come to a common conclusion by a discussion, but there is always a danger that, in doing so, they may go a little too far and they may really create the impression, either in the minds of the jurors as a whole or in the minds of some of the jurors, that there is a legal duty on the members of the jury to agree at any cost. There is, of course, no such legal duty. It has long since been pointed out (I refer to Hales Pleas of the Crown, Vol. 2, page 297) that "Men are not to be forced to give their verdict against their judgment." That is a fundamental rule, and any judge who creates an opposite impression in the minds of jurors, or a jury, is guilty of an error of law, and if that is established the verdict will be set aside. But looking at this as a whole I cannot find that that is the true view, and though I must again utter a warning against any laxity or looseness of expression in these very important directions or charges to juries, and though I cannot help feeling that there has been at some stages some laxity in what the learned judge said here, yet reading it as a whole, I think the charge falls on the right side of the line and that there was no mis-direction so as to vitiate the finding of the jury.

For all these reasons I think the appeal fails and should be dismissed with costs.

Romer, L.J., I agree and have but a very few words to add upon the last point that was dealt with by Lord Wright, M.R. If I had thought that the learned judge had directed the jury, in order to avoid the expenses of another trial, that it was the duty of the minority to pretend to concur in the verdict when they did not concur in fact, I

should agree that there ought to be a new trial in this case. As I read the learned judge's direction to the jury when they came back into court soon after one o'clock, it amounted to this and no more : I realise that, if two persons are in disagreement concerning a question where they think some moral principle is involved, it is useless to ask them to try to agree ; it is useless to ask them to try to see the other person's point of view. But this is a not a question where any principle is involved ; it is a question of degree, and therefore a question on which you ought to come to an agreement ; a question on which you ought to be able to see the other side's point of view. Go back and try to agree. If after trying you are still unable to concur in the verdict that the majority wish to give, then it is your duty to maintain your position and refuse to concur. In those circumstances it appears to me that there was no mis-direction at all, and I agree that this appeal fails.

CHARLES, J. : I agree, and were it not for the fact that I regard this last point as a matter of great importance, I should not be disposed to say anything. As it is, I have a very few words to add in order that I may indicate what my view is. It is a very ancient rule of court that any judge who attempts to usurp the functions of a jury by telling them, or any of them, what they ought to do, or which way their verdict should be, does wrong, and has mis-directed that jury. The foundation of that rule is that every juryman takes his oath to decide the case according to the evidence, and nothing must interfere with that. Frequently, and desirably in my judgment, where a jury indicate that they are unable to come to an agreement, judges say : " Go away and discuss the matter again ; you have come back too soon, and if you discuss it further you may arrive at a conclusion, and if you do it will be the better for all people." That is quite legitimate. In this particular direction I am bound to say that there are several statements, which my Lord has indicated, which, if taken by themselves divorced from their context, do give colour to the submission that the judge was in fact doing that which he was not entitled to do, interfering with the free judgment of the jurymen ; and if I believed that, reading the whole of that direction, he had so interfered with the free judgment of the jury, I should have had no hesitation myself in saying that that was a mis-direction and that there would have to be a re-trial of the case. But a close reading of this direction makes it, to my mind, abundantly clear that such an intention certainly was never in the judge's mind and, indeed, over and over again he says—I am paraphrasing—" Please do not understand that I am saying that any of you ought to do this or ought to do that. You must stick to your principles but "—and then he gives a little homely advice—" do not be unreasonable, you know, because," as he says, " the other fellow has got a point of view and perhaps that might be a good one." I do not think, on a close reading of that direction,

that it goes one inch beyond that. That being so, it is quite clear, if I am right in my conclusion upon that, that there was no mis-direction at all, and I agree with my Lord.

Solicitors: *Freke Palmer, Romain & Romain* (for the appellants); *Shaen, Roscoe, Massey & Co.* (for the respondents).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

MINNEVITCH *v.* CAFE DE PARIS (LONDRES), LIMITED.

[King's Bench Division (Macnaghten, J.), **April 6, 1936.**]

Contract—Implied condition—Continuance of state of things—Public mourning—Band performances.

The plaintiff was the leader of an orchestra whose performance was of a light and comic nature. His contract of employment with the defendants contained a "no play, no pay" clause. On Monday, Jan. 20, 1936, the news having spread that the condition of His Majesty King George V was serious, the plaintiff was informed by the defendants that his performance would not be required; and following upon the King's death, the plaintiff's performance was again postponed until the end of the same week. The plaintiff and his orchestra were at all these times ready and willing to perform. In answer to the plaintiff's claim for the contract fee for the six days the defendants alleged that circumstances over which the defendants had no control had intervened to make the performance impossible:—

Held: the refusal of the defendant to allow the performance on the Monday and Tuesday was reasonable, but there was no good reason for the refusal on the other four days, and the plaintiff was entitled to be paid his fee for those days.

[**EDITORIAL NOTE.** The principle to be applied in the present case was considered in the "Coronation cases" and depends upon the implied condition that the state of things necessary for the performance of the contract will continue to exist and so make its performance possible. The precise point here, however, is an extension of those cases, since the impossibility of performance was temporary, and the question to be decided was at what time it ceased to exist, and the contract was restored in its full force.

For the Implied Condition here discussed, see HALSBURY, Hailsham Edn., Vol. 7, pp. 213, 214, para. 296; and for the Cases, see DIGEST, Vol. 12, p. 385, 386, Nos. 3167-3171.]

Cases referred to:

(1) *Browning* v. *Crumlin Valley Collieries*, [1926] 1 K.B. 522; 41 Digest 220, *585.*

(2) *Bell* v. *Lever Bros., Ltd.*, [1932] A.C. 161; Digest Supp.

(3) *Trollope (Geo.) & Sons* v. *Martyn Bros.*, [1934] 2 K.B. 436; Digest Supp.

Action to recover £300 fees due under a contract engaging the plaintiff and his band, the plaintiff alleging that he and his band were at all material times ready and willing to perform, and the defendants alleging that such performance was prevented by a period of national mourning.

Theobald Mathew for the plaintiff.

A. T. Denning for the defendants: This is a case of frustration of contract, which may arise under three conditions: (1) where the subject-matter is destroyed; (2) where circumstances intervene rendering performance impossible, and (3) where circumstances regarded by the parties as an essential part of the contract have ceased to exist.

When this contract was made there was an implied understanding that the life of the nation would continue in its normal course. *Browning* v. *Crumlin Valley Collieries* (1), *Bell* v. *Lever Bros., Ltd.* (2), *Trollope (Geo.) & Sons* v. *Martyn Bros.* (3). Owing to the light and comic nature of the plaintiff's performance it was impossible that it could have been in fact presented immediately after the death of the King. The defendants therefore rightly forbade it and relied on the "no play, no pay" clause.

Theobald Mathew in reply: No implied term can be read into the contract. If the plaintiff had been asked to agree to such a term he would have refused because he had to pay his own orchestra just the same whether they performed or not. The "no play, no pay" clause could not apply so long as the plaintiff was ready and willing to play.

MACNAGHTEN, J.: This is a claim to recover £300, being one week's salary under an agreement dated Nov. 28, 1935, whereby the defendants agreed to engage the plaintiff and his band for a period of four weeks and three days. There is a proviso in the contract whereby it may be terminated summarily if, *inter alia*, the artists should be absent for three performances, or there should be a complaint by the Lord Chamberlain, or a wilful breach by the plaintiff of the regulations of the Lord Chamberlain, the London County Council or other competent authority. There is also a "no play, no pay" clause. The plaintiff duly carried out his obligations under the contract until Monday, Jan. 20. I should mention that his performance was of a humorous character. The plaintiff and his band arrived at the Café de Paris on Monday evening shortly before midnight as usual and were informed that their services would not be required. The following day the restaurant was completely closed and although the plaintiff and his band were ready and willing to play they were not able to. On Wednesday he was informed there would be no performance that week. He is now suing for the £300 that he would have been entitled to under the contract if he had given the six performances —there was no Sunday performance. The defendants resist the claim on the ground that under clause 8 they are under no obligation because there was in fact no performance.

It is common ground that this agreement while it imposed upon the plaintiff an obligation to attend at the appointed time, also imposed upon the defendants an obligation to permit the plaintiff to give his performance: and if without just cause or excuse they refuse to allow the performance to take place they must none the less pay under the

agreement. They say that they have such a just cause or excuse, in that all other restaurants of this kind in the West End of London where cabaret performances are given ceased to give them. I do not think this will afford any answer to the plaintiff's claim. The fact that there may have been a public mourning clause in other contracts does not assist to determine the issue in this case. In my opinion the determination of the issue in this case depends upon whether the defendants can establish just cause and excuse for refusing the plaintiff and his band permission to perform.

So far as Monday night is concerned I think they do establish such a just cause and excuse. In the circumstances of Monday night it was not reasonably possible for the defendants to allow the performance to be given even if the plaintiff and his band had been really willing to give it. I have more doubt about Tuesday night. However, it is admitted that on that night all theatres and places of entertainment were closed, and the public using these forming a great part of the clientele of the Café de Paris, it may be reasonable that the defendants should close their premises on that night also.

With regard to the four following nights I can find no justification or excuse for refusing to allow the plaintiff and his band to perform on those nights. Of course, it was reasonable to refuse from the point of view of the defendants, because it was unlikely that many people would attend ; but so far as the plaintiff was concerned he had engaged himself and his band for this week and was under an obligation to remunerate them. It has been urged by both sides that the matter should be looked at from the point of view of what stipulation must necessarily be implied in the contract : and this stipulation must be that if by reason of some cause over which they have no control the performance of the contract by them becomes impossible, then and only then are the defendants excused. I find the performance to have been impossible on Monday and Tuesday, but the plaintiff is entitled to recover for Wednesday, Thursday, Friday and Saturday nights, that is to say £200 and costs.

Solicitors : *Theodore Goddard & Co.* (for the plaintiff) ; *Fladgate & Co.* (for the defendants).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

WEST BROMWICH BUILDING SOCIETY *v.* BULLOCK.

[KING'S BENCH DIVISION (Atkinson, J.), **April 7, 1936.**]

Mortgage—Building Society—Mortgagor transferring property and shares in society—No release from covenant—Action on covenant.

The defendant received from the plaintiff building society an advance upon mortgage of certain property, such advance being regulated by the number of advanced shares held by him. He subsequently transferred the equity of redemption in the property and his shares to a third party. The rules provided that when that had been done the transferee should be liable for all subscriptions and that the board of the society might grant to the original mortgagor, at his cost and charges, a release from all future liability in respect thereof. The covenant in the mortgage was to pay the money advanced to him and also such other subscriptions and payments as may become payable in respect of the shares :—

HELD : the proper construction of the covenant was that the original mortgagor was liable to pay all sums due in respect of such shares whoever the shareholder might be ; and the proper construction of the rules was that in order to be released from the covenant, he must obtain a release from the board.

[**EDITORIAL NOTE.** The remedies of a mortgagee under a mortgage are quite well settled : the one arising out of the charge against the land, the other arising out of the covenant against the mortgagor personally. This case is only concerned with the latter and in the ordinary way this remedy is available until a release of the covenant is executed by the mortgagee or those entitled to enforce it. The conveyance of the property has no effect upon the liability under the covenant. In this case there was a rule providing for the position on the conveyance of the equity of redemption by the mortgagor. The position is also complicated by the fact that advances can only be made to holders of advanced shares and the rules provide for the transfer of the shares and the liability thereunder. Finally there is a rule which speaks of the transfer of the property and the shares and the liability of the transferee under the mortgage. Upon such happening the board of the society, the rule says, "may release the mortgagor." In the present case no release was ever executed, and, although everything else was done, the liability on the covenant remained, and the action against the original mortgagor was maintainable by the society. In considering this case, regard should be had to the case of *Priestley* v. *Hopwood* (1864) 4 New Rep. 239 ; 7 Digest 483, *171.* There the mortgage was discharged by the transferee of the equity of redemption, and it was held that the original mortgagor had no further liability under the shares, which had not been assigned.

FOR THE REMEDY ON THE COVENANT, see HALSBURY, 1st Edn., Vol. 21, pp. 267-271, paras. 473-479, and FOR THE CASES, see DIGEST, Vol. 35, pp. 533-540, Nos. 2639-2686.]

Cases referred to :

(1) *Ingledew and Others* v. *Temple* (1881), 70 L.T. Jo. 263.

(2) *Taylor* v. *Bank of New South Wales* (1886), 11 App. Cas. 596 ; 26 Digest 191, *1478.*

ACTION for amount due under a covenant contained in a mortgage dated July 23, 1929, made between the defendant and the plaintiffs,

whereby the defendant covenanted to pay in respect of premises known as Pattingham House, Pattingham, in the county of Stafford, the monthly subscriptions of £16 10*s*. 0*d*. and interest at 5½ per cent. per annum in accordance with the rules of the plaintiff society. The defendant bought Pattingham House, Pattingham, Wolverhampton, in 1920 for the sum of £2,000 and spent a further £2,000 on improvements. The defendant became a member of the plaintiff society, and on June 22, 1929, he mortgaged the property to the plaintiffs to secure an advance of £2,200. The defendant had a further mortgage on the property from one Trow who was also a member of the plaintiff society. On Dec. 31, 1931, the defendant transferred his shares in the plaintiff society to Trow and on the same date conveyed the mortgaged property, subject to the mortgage, to Trow. In the transfer there was a covenant to discharge liability under the mortgage and to indemnify the defendant. The transfer of the shares and the conveyance of the mortgage were carried out in accordance with the society's rules but the defendant failed to obtain a release from all future liability in respect of the property from the society. Trow defaulted in the payment of his instalments to the plaintiff society and in May, 1935, the property was put up for auction and sold for £1,250, and the plaintiff society called upon the defendant to make good the balance due, namely the sum of £994 14*s*. 3*d*.

A. J. Long for the plaintiffs.

R. A. Willes for the defendant.

Atkinson, J.: On June 22, 1929, the defendant borrowed £2,200 from the plaintiffs. The loan was secured by a mortgage of that date on some property at Pattingham. Default was made, and the security has been realised by the society, leaving a sum of £994 14*s*. 3*d*. still owing. This action is brought against the defendant upon the covenant in the mortage, and the defence is that the defendant has been, in effect, released; that the security was given to secure a liability which rested upon the defendant only so long as he was a member of the society, a liability to pay subscriptions as a member, and that that liability terminated when he ceased to be a member. The money was borrowed under and in accordance with the rule of the society.

The society makes loans only to its members. A person becomes a member by obtaining a share or shares. There are three kinds of shares, investing shares, paid-up shares, and advanced shares. This case concerns only advanced shares. An advanced share is of the value of £10. The £10 is advanced to the member, applying for such share, if he be accepted as a member, and he repays the £10 with interest by monthly instalments. By rule 50 "Every member receiving an advance shall give security by mortgage to the satisfaction of the board." The rule does not say for what the security is to be given, but I think the

implication is that the security is to be for the advance. The object of granting advances only to persons who become members in the society is disclosed by rules 84 and 85. By rule 84, if upon the completion of an annual audit there is a surplus, that surplus may be distributed in the form of bonuses to the various classes of shareholders ; and by rule 85 if, on the other hand, there is a deficiency, shareholders are liable to make good the deficiency in equal proportions according to their interests. It is clear that the advances are in respect of shares, and that repayment under the rules is due from the member on and in respect of his shares, and proof of membership is a pass book. The pass book issued to the defendant was numbered 7608. On the first page that is described as the registered number, and the name and address of the shareholder is written there by the society. Instalments are indicated, and they are entered in the book as and when they are paid. Apart from any further liability, if any, imposed by the mortgage, I think that under the rules repayments are due from the holder of the share for the time being. Shares can be transferred ; no particular manner of transfer is indicated in the rules, but I think that there must be a complete transfer if a pass book is handed over to an assignee with the consent of the society, and if the society strikes out the name of the assignor and inserts the name of the assignee, and substitutes the name of the assignee in the register and books of the society in place of the assignor. In this case, on Dec. 31, 1931, the defendant transferred his shares in this way to E. H. Trow. Trow was accepted as a shareholder in place of the defendant, and I think that the defendant's liability under the rules as a shareholder was then terminated.

The question then arises whether the defendant's liability on the mortgage is also terminated. On the same date, Dec. 31, 1931, the defendant conveyed the mortgaged property, subject to the mortgage, to Trow. In the transfer there was a covenant to discharge liability under the mortgage and to indemnify the defendant. Everything which was done in connection with the transfer of the shares and the assignment of the equity was in accordance with rule 60, and that rule provides :

> If any member, who shall have executed a mortgage to the society, shall be desirous of selling the mortgaged property, subject to the mortgage, he shall be at liberty to do so with the consent of the board, upon first duly transferring the shares secured by such mortgage to the intended purchaser, in the manner provided by these rules, and upon such transfer being completed and all arrears due to the society from the mortgagor being paid, and the conveyance to the purchaser executed, such purchaser shall thenceforth become liable to pay all subscriptions payable in respect of such shares ; and the board may grant to the original mortgagor, and at his cost and charges, a release from all future liability in respect thereof.

Now everything provided by that rule was done except the last step.

The society was not asked to release the defendant, and, of course, did not do so. Mr. Willes says that this is immaterial ; that the indebtedness secured was only the defendant's indebtedness as a member, and that if in fact the indebtedness of the defendant as a member is at an end, a security given to secure that indebtedness is necessarily discharged. It is, therefore, necessary to determine the nature of the obligations imposed by the mortgage and to ascertain if in fact that security was limited to securing the defendant's obligation as a member. The security consists of two things. First, there is a covenant, and then there is a charge upon the property described in the schedule. Now, I think it must be clear that the charge is not limited to instalments, etc., payable by the mortgagor as a member, and merely so long as he is a member of the society. I think it extends to instalments and other payments payable in respect of these shares, whoever the holder of the shares may be. It would be impossible to argue that the acceptance of Trow as a member, in place of the defendant, put an end to the charge upon the property, and indeed this is not suggested in this case. The measure of the charge, I suppose, is that defined in the proviso for redemption, and that proviso is that " If the mortgagor shall pay to the society all instalments, etc., and other moneys, which according to the rules for the time being shall from time to time become payable in respect of the said shares." There is not a word there to indicate that the charge is limited to instalments due under the rules by the mortgagor. It in terms secures " payments due in respect of the said shares," and, I think, that means whoever may be a shareholder at any particular time. And, I think, it is equally clear that the covenant is not so limited, but that it is a covenant by the defendant to repay the money advanced to him, and also such other subscriptions and payments as may become payable in respect of the shares, whoever the shareholder may be. In other words, I am unable to agree with Mr. Willes' argument that the covenant relates only to the defendant's own personal obligations as a member of the society. I think it relates to the money advanced, and remains effective notwithstanding that he ceases to be a member. I think that this view is more consistent with rule 60 than that presented on behalf of the defendant. The rule implies that the board may refuse to grant a release, and that if in fact a release is not granted the mortgagor's liability remains, notwithstanding an assignment of the shares.

The only case cited as bearing on the point was a case of *Ingledew and Others* v. *Temple* (1). There the facts were really, as far as I can see, exactly like the facts in this case, and the view there taken was that the defendant had been released. The difficulty about getting guidance from that case is, as I think, that the question depends on the wording of the mortgage, that the report does not indicate exactly in what words the

covenant was expressed but there is an indication dealing with the proviso, and it is " Proviso for redemption. If the mortgagors, their heirs, executors, administrators or assigns shall from time to time according to the rules for the time being of the society duly pay to the society all subscriptions, insurance funds, etc., which might become due," and then follows a covenant in which they agreed to pay the society these moneys. It may very well be that the covenant was so worded as to indicate that the money secured was only money which would become owing from the mortgagor as a shareholder. There is not a word there to indicate that the covenant extended to the repayment of the money advanced. In the present case there are two branches of the action. First there is a covenant to pay the said £2,200, that is the money advanced, and then comes a covenant to pay subscriptions. In *Ingledew's* case (1), nothing whatever is said about there being a covenant to pay the money advanced, and therefore I am unable to regard that case as an authority governing the case with which I have to deal.

Then it was argued that in any event the defendant became a surety only, and that the sale of the property without his being given an opportunity to redeem discharged him. I was very far from satisfied that his position in relation to this covenant is that of a surety, but even if he be in that position, the sale of a security by creditor, if in accordance with the terms of the contract, does not discharge the surety. There is no evidence that the sale was otherwise than in accordance with the contract, and therefore in my opinion the plaintiffs are entitled to judgment for the amount claimed. The authority for the last proposition, I think, can be found in the case of *Taylor* v. *Bank of New South Wales* (2), but is a proposition which will be found laid down in any text book dealing with the subject.

Solicitors: *T. D. Jones & Co.*, agents for *Lyon Clark & Co.*, West Bromwich (for the plaintiffs); *Ward, Bowie & Co.*, agents for *James F. Addison & Cooper*, Walsall (for the defendant.)

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

STEVENS *v.* WALKER.

[Court of Appeal (Lord Wright, M.R., Romer, L.J., and Charles, J.), **April 6, 1936.**]

Practice—Remission of action for personal injuries to county court—Grounds for exercise of discretion—Means of plaintiff—Severity of injuries—County Courts Act, 1919 (*c.* 73), *s.* 2.

A labourer claimed damages for personal injuries, and before defence delivered the defendant applied that the plaintiff should give security for costs or in default the action should be remitted to the county court under County Courts Act, 1919, s. 2 :—

Held : in exercising its discretion in such a case to remit the action the court must be informed of and take into consideration (*a*) the severity and gravity of the injuries alleged, (*b*) whether there is a probable or *prima facie* defence. Cases proper for the award of heavy damages ought to be tried in the High Court.

[EDITORIAL NOTE. The remission of cases to the county court is a matter upon which conflicting views have recently been expressed by judges, and the present statement of the law will be of great benefit to litigants in "running down" cases. The remission of cases prosecuted under the Poor Persons Rules was commented on in the Annual Report of the Law Society recently issued, and it was there pointed out that such cases had been carefully inquired into by a committee of the Society and considered proper to be commenced in the High Court rather than the county court. It is now clear that where injuries are sufficiently severe to justify an award of damages of a substantial figure, the case should be allowed to proceed in the High Court and not be remitted. It also appears that no order should be made until the defendant has delivered a defence or sworn an affidavit that he has a good defence to the action.

As to Action of Tort remitted to the County Court, see HALSBURY, Hailsham Edn., Vol. 8, pp. 181, 182, paras. 284, 285 ; and for the Cases, see DIGEST, Vol. 13, pp. 484, 485, Nos. 340-352.]

Cases referred to :—

(1) *Banks* v. *Hollingsworth*, [1893] 1 Q.B. 442 ; 34 Digest 536, *99*.
(2) *Cook* v. *Imperial Tobacco Co.*, [1922] 2 K.B. 158 ; 13 Digest 485, *352*.
(3) *Perry* v. *London General Omnibus Co.*, [1916] 2 K.B. 335 ; 13 Digest 485, *351*.
(4) *Critchley* v. *Brown* (1886), 2 T.L.R. 238 ; 13 Digest 484, *342*.
(5) *Palmer* v. *Roberts* (1873), 29 L.T. 403 ; 13 Digest 483, *328*.
(6) *Farrer* v. *Lowe* (1889), 5 T.L.R. 234 ; 13 Digest 484, *343*.
(7) *Lea* v. *Parker* (1884), 13 Q.B.D. 835 ; 13 Digest 484, *345*.

Appeal by leave of the Court of Appeal from the decision of du Parcq, J., in chambers confirming the order of the Wakefield district registrar remitting an action for damages for personal injuries to the Doncaster County Court for trial if the plaintiff should fail to give security for the defendant's costs. The plaintiff, a labourer, claimed damages for injuries he had received through the negligent driving of the defendant's motor lorry by the defendant's servant. The writ was issued from Wakefield District Registry. Before entering a defence the defendant, who was a married woman carrying on a dairy business, applied

to the district registrar that the plaintiff should be ordered to give security for the costs of the action or in default that it should be remitted to the country court under the County Courts Act, 1919, s. 2. The registrar made the order. The plaintiff appealed to the judge in chambers who confirmed it subject to a reduction of the amount of security from £50 to £25. At the same time he refused leave to appeal to the Court of Appeal on the ground that the matter was one entirely for his discretion

The defendant's affidavit in support of the application below was in these terms so far as it is material :—

1. This is an action brought by the plaintiff to recover damages by reason of the alleged negligence of my servant.

2. The plaintiff . . . resides with his parents and is a single man. The house is one built by the urban district council to house people who have been removed from other property under a slum clearance scheme.

3. The plaintiff is a labourer, and I understand he has been unemployed for about nine months.

4. For reasons aforesaid I say and verily believe that the plaintiff has not the visible means of paying the High Court costs should a verdict not be found in his favour.

Wilfrid Clothier, *K.C.*, and *H. H. Maddocks* (*Lewis F. Sturge* with them) for the appellants : There is much uncertainty as to the remission to the county court under the County Courts Act, 1919, s. 2. Different judges have expressed divergent opinions as to the grounds on which they should exercise their discretion to make the order. The section enacts that :

In any action founded on tort commenced in the High Court the defendant may, on an affidavit made by himself or any person on his behalf showing that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff, apply to the court or a judge for an order to transfer the action to a county court ; and thereupon the court or judge unless the plaintiff satisfies the court or judge that he has such means, may, if the court or judge having regard to all the circumstances of the case thinks fit so to do, make an order that unless the plaintiff within a time to be limited in the order gives security for the defendant's costs to the satisfaction of the court or a judge the action shall be transferred to such county court to be named in the order as the court or judge may deem the most convenient to the parties.

Under the Acts of 1867 and 1888 it was for the plaintiff to satisfy the court that he had a case fit to be tried in the High Court. Under the County Courts Act, 1919, s. 2, the discretion is wider. There is no reference to "fit to be prosecuted in the High Court." In the present case the judge below was wrong in thinking that the gravity of the plaintiff's injuries was not an important consideration, but based his decision on the fact that the plaintiff had no means. Further, the judge's decision would have an important bearing on the Poor Persons Procedure.

[He referred to *Cook* v. *Imperial Tobacco Co.* (2), *Perry* v. *London General Omnibus Co.* (3), *Critchley* v. *Brown* (4), *Palmer* v. *Roberts* (5), *Banks* v. *Hollingsworth* (1), *Farrer* v. *Lowe* (6), and *Lea* v. *Parker* (7).]

The defendant was not represented before the Court of Appeal.

Lord Wright, M.R.: This is an appeal by leave of this court from an order of du Parcq, J., remitting to the county court an action for personal injuries. The jurisdiction to make the order is now settled and defined in actions of tort by the County Courts Act of 1919, s. 2. The order made was conditioned on the plaintiff giving security for the costs of the action. It is material to observe that the foundation of the procedure is the affidavit that the plaintiff has no means, but still that foundation being laid, the judge must have regard to all the circumstances of the case. Sect. 2 replaced the County Courts Act, 1888, s. 66. That Act made it a condition that the plaintiff should satisfy the court that he had a case fit to be tried in the High Court. The language is different, but I am not sure that there is any material difference as appears from Lord Esher's judgment in *Banks* v. *Hollingsworth* (1).

Uncertainty seems to have arisen, especially in cases of personal injuries through the introduction of motor cars. There is seldom any difficult question of law in a running-down case, but often a really serious question as to the amount of damages arises. It is true the county court judge has unlimited jurisdiction in a remitted action, but still, as a rule, he is not used to handling the very substantial sums which may be adequate, and therefore the court or judge in exercising the discretion to remit must have regard to this question. Another material matter which should be considered is whether or not the plaintiff has *prima facie* a good cause of action.

It has been the practice to state in the affidavit that the defendant has a good defence on the merits. In Chitty's King's Bench Forms, this is said not to be necessary though usual. If it is not inserted, the judge should inquire. These applications should not be considered until the defence is delivered or at least the defendant has made an affidavit that he has a good defence. The judge should have the following matters before him when exercising his discretion: (i) the severity and gravity of the injuries alleged and (ii) whether there is a probable or *prima facie* defence.

In the present case he appeared to be of opinion that the relevant matter was whether a difficult question of law was likely to arise. I am loath to interfere with the learned judge's decision, but the authorities cited show that this court may interfere if it comes to the conclusion that the judge has exercised his discretion on irrelevant or insufficient grounds.

In the present case the judge had not before him either of the grounds I have referred to. The order will therefore be set aside with costs here and below.

Romer, L.J.: I agree. Before the discretion can be properly

exercised under sect. 2, it is essential the court should ascertain what are the issues. In the present case the statement of claim raises two issues : (1) negligence ; (2) amount of damages ; and the judge was not informed whether the defendant intended to dispute the question of negligence. I will add that amongst the circumstances to be taken into consideration must be included the magnitude of the matter involved just as much as the difficulty of the case.

CHARLES, J. : I agree, and would add nothing more if it were not that we are interfering with the learned judge's discretion and the modern frequency of accidents resulting in personal injuries. [His Lordship read sect. 2 of the Act of 1919.] In the present case the plaintiff had a perfectly good case if nothing more had transpired than was before the judge when he made the order. The judge should have before him material from which he can form some opinion as to whether there is likely to be a good defence to the action. The gravity of the matter should be carefully considered. In a case of real gravity the more appropriate court is the High Court.

For these reasons I think the appeal should be allowed with costs here and below.

Solicitors : *Maude & Tunnicliffe*, agents for *Green & Williamson*, Wakefield (for the plaintiff).

[*Reported by* C. ST. J. NICHOLSON, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* LIEUT.-COLONEL THE HON. T. C. B. MORGAN-GRENVILLE-GAVIN.

[KING'S BENCH DIVISION (Lawrence, J.), **April 7, 1936.**]

Income Tax—Disposition for more than six years—Covenant with company—Taxpayer principal shareholder in company—Sham transaction—Finance Act, 1922, *s.* 20 (1) (*b*).

On Mar. 2, 1934, C. B. H., Ltd., was incorporated, the respondent taking 199 of the 200 £1 shares, which were issued at a premium of £84 5*s.* 0*d.* On the same day M. G. G., Ltd., was incorporated, C. B. H., Ltd., taking 98 of the 100 £1 shares, which were issued at a premium of £191. The remaining shares in both companies were taken by nominees of the respondent. On Mar. 5, 1934, the respondent entered into a deed of covenant with M. G. G., Ltd., covenanting to pay M. G. G., Ltd., £3,000 a year for seven years in consideration of a payment of £19,100, which was paid to the respondent. On Mar. 19, 1934, C. B. H., Ltd., went into voluntary liquidation. The respondent duly paid £3,000 to M. G. G., Ltd., which declared a dividend of £3,019 10*s.* 0*d.*, on its shares to C. B. H., Ltd. The liquidator of C. B. H., Ltd.; thereupon paid out this £3,019 10*s.* 0*d.* to the respondent. The respondent claimed to deduct from his total income for surtax purposes £4,000, the gross equivalent of the annual amount payable under the deed of covenant. The special commissioners held that the legal effect of the transactions was to diminish the respondent's statutory income.

The appellants contended that the transaction was colourable and that the respondent was not under any necessity to bear an annual sum by way of annuity or otherwise and had not in fact paid away £3,000 as claimed by him :—

Held : the respondent was entitled to deduct £4,000 from his total income for surtax purposes, the special commissioners having found as a fact that the transaction was not a sham.

[**EDITORIAL NOTE.** This is a further case under the Finance Act, 1922, s. 20 (1) (*b*) dealing with dispositions after May 1, 1922, being for a period which cannot exceed six years. Such dispositions leave the income disposed of, so far as income tax is concerned, the income of the disposer, but if the period is not one which cannot exceed six year, the income is that of the disponee. The taxpayer here has in effect set up an arrangement whereby he disposes for seven years of £3,000 net income to a company in which he is virtually the only shareholder and, therefore, ultimately receives the money back. The benefit to the taxpayer is to obtain a reduction of his income for surtax purposes by the gross amount corresponding to a net amount of £3,000. The tax being at 5*s*. in the £ this gross amount was in the present case £4,000. The machinery here adopted involves the formation of two companies and the winding up of one so that it is only applicable to the case of large incomes.

For the Law on this Point, see HALSBURY, Hailsham Edn., Vol. 17, p. 269, para. 538 ; and for the Cases, see DIGEST SUPP., Income Tax, No. 576 (*a*).

Cases referred to :

(1) *Secretary of State in Council of India* v. *Scoble*, [1903] A.C. 299 ; 28 Digest 65, *337*.

(2) *Inland Revenue Commissioners* v. *Gas Lighting Improvement Co.* (1923), 12 Tax Cas. 503.

(3) *Inland Revenue Commissioners* v. *Sansom*, [1921] 2 K.B. 492 ; 8 Tax Cas. 20 ; 28 Digest 101, *612*.

(4) *Gramophone and Typewriter, Ltd. v. Stanley*, [1908] 2 K.B. 89 ; 5 Tax Cas. 358 ; 28 Digest 30, *153*

(5) *Westminster* (*Duke*) v. *Inland Revenue Commissioners*, [1936] A.C.1 ; 19 Tax Cas. 490.

Appeal by the Commissioners of Inland Revenue against the decision of the Commissioners for the Special Purposes of the Income Tax Acts whereby they held that the respondent was entitled to deduct the sum of £4,000 as the payment of an annual sum for the purposes of surtax.

The Attorney-General (*Sir Donald B. Somervell, K.C.*) and *Reginald P. Hills*, for the appellants.

A. M. Latter, K.C., and *F. Heyworth Talbot* for the respondent.

Lawrence, J. : In this case, the question is whether the respondent was entitled to deduct the sum of £4,000 as the payment of an annual sum for the purposes of surtax. The facts of the case are somewhat peculiar.

On Mar. 2, 1934, two companies were incorporated : one called Cliff Bridge Holdings, Ltd., and the other one called M. G. G. Securities, Ltd. The capital of the Cliff Bridge Holdings, Ltd., was 200 £1 shares, in which the respondent took 199 ; and it was assumed before me

(although not expressly admitted) that the other share was taken by a nominee of the respondent. These shares were issued at a premium of £84 5s. 0*d*. On the same day, as I have said, M. G. G., Ltd., was incorporated with a capital of 100 shares of £1 each, two of which went to nominees of the respondent and 98 went to Cliff Bridge Holdings, Ltd. ; and those shares were issued at a premium of £191. The money for the capital in Cliff Bridge Holdings, namely, £17,050 capital and £2,000, making up £19,050, was all supplied by the respondent, who drew a cheque on Mar. 7, 1934, for that amount, the £17,050 being the price of the shares issued at a premium of £84 5*s*. 0*d*. The Cliff Bridge Holdings, Ltd., used that money for the purpose of paying for the 98 shares in M. G. G., Ltd. ; the shares being at a premium of £191.

On Mar. 5, 1934, before that cheque was actually drawn by the respondent in favour of Cliff Bridge Holdings, Ltd., the respondent had entered into a deed of covenant, covenanting to pay M. G. G., Ltd., the sum of £3,000 a year for seven years in consideration of a payment of £19,100 That sum of £19,100 was paid to the respondent by M. G. G., Ltd., in return for the deed of covenant. So that the effect, in fact, of those transactions was that the respondent provided £19,050 which enabled the Cliff Bridge Holdings, Ltd., to purchase the shares of M. G. G., Ltd., and enabled M. G. G., Ltd., to pay for the covenant into which the respondent had entered on Mar. 5, and so to pay back to the respondent the money which he had just parted with, the sum of £19,100. On Mar. 19, 1934, Cliff Bridge Holdings, Ltd., went into voluntary liquidation, and on Mar. 26, 1934, the respondent gave a cheque for £3,000, being the first payment of the annuity. He gave that cheque, of course, to M. G. G., Ltd., and that cheque was not collected until Apr. 9, 1934, and then M. G. G., Ltd., declared a dividend on its shares to the Cliff Bridge Holdings, Ltd., of £3,019 10*s*. 0*d*. (it was an interim dividend), and the liquidator of the Cliff Bridge Holdings, Ltd., paid out to the respondent that £3,019 10*s*. 0*d*. ; £2,000 of it as a repayment of the loan which he had made and the balance as a distribution of assets in the voluntary winding up. The respondent claims to deduct for surtax purposes the £3,000 which he has paid and which he is going to pay under that deed of covenant.

Those are the facts and the commissioners have held that the deed of covenant of Mar. 5, 1934, had been duly executed by both parties, that the sum of £19,100 therein mentioned as the purchase consideration had been paid by M. G. G., Ltd., to the respondent, that the respondent had paid to M. G. G., Ltd., the sum of £3,000, and the company had accepted the same, as representing the amount due upon Mar. 15, 1934, in accordance with clause 2 of the covenant, that the legal effect of the transaction was to diminish the statutory income of the respondent as contended for on his behalf, the respondent's contention being that

the income of the respondent had been diminished by £4,000, that being the gross equivalent of the net annual sum payable by him during the year under the terms of the deed of covenant, and that in the computation of the total income of the respondent the sum of £4,000 fell to be deducted.

The Attorney-General and Mr. Hills have argued that this finding of the commissioners ought to be overruled on the ground, first of all, that the transaction was colourable, and secondly, that, if you look at the substance of the matter, you will see that the payment under the deed of covenant was not an annuity. My attention has been called to a number of cases, and the inclination of my own view would have been to hold that, in the circumstances of this case, when the entire assets are derived from an alleged taxpayer and returned to that taxpayer, and when the only business of the companies which are incorporated by the taxpayer and in which the taxpayer holds all the shares by himself or his nominees is to receive money from the taxpayer and to repay that money to the taxpayer, the business of those companies is the business of the taxpayer, that the companies must be regarded merely as agents of the taxpayer, and that, therefore, such an annuity as is in question in this case, being paid by the taxpayer to his own agent, is not a deduction for the purposes of surtax. But in view of the contentions put forward by the Crown and the findings of the commissioners, I do not think that that view is open to me or that it would be proper for me to hold that that was the proper judgment in this case, for the contentions which were put forward by the Crown were not that the business of these companies was the business of the taxpayer but that the transactions were artificial, illusory and a sham and should be disregarded.

After placing, in the third contention, reliance upon *Scoble's* case (1), the Crown go on to contend "that the substance of the matter was that, by means of the exchange of cheques and in the circumstances of the case, the respondent was not under any necessity or required to bear any annual sum by way of annuity or otherwise, and had not in fact paid away the sum of £3,000 as claimed by him." That contention, and the reliance upon *Scoble's* case (1), seem to me to be only another way of stating that the transactions were artificial, illusory and a sham. All those contentions appear to me to have been negatived by the commissioners in finding that the legal effect of the transaction was to diminish the statutory income of the respondent as contended for on his behalf.

Mr. Latter, on behalf of the respondent, drew my attention to the observation of Lord Sumner in the *Gas Lighting Improvement Company* case (2), as to the machinery of companies. He pointed out that in this case the business of the M. G. G. Company was to buy an annuity. He said that that was a perfectly legal business and that if it was a legal business and there was no finding or contention that that business was

the business of the respondent, it was impossible for me to find that it was the business of the respondent or to find that the commissioners had not evidence before them upon which they might negative the contention that the transactions were illusory and shams. I feel bound to agree with that argument. The commissioners have held that the companies were real companies and that the transaction into which they entered were not sham transactions but were real transactions and, impliedly, that they constituted the business of those companies.

Similarly, with reference to Cliff Bridge Holdings, Ltd.; the business, says Mr. Latter, of that company was not a sham business; as the commissioners have held, it was the investment in shares of the M. G. G. Company. He says, therefore, that these facts are ample evidence upon which the commissioners could find that the transaction was not a sham transaction. He draws my attention (as, indeed, the Attorney-General had already drawn my attention) to the case of *Sansom* v. *Commissioners of Inland Revenue* (3), where ROWLATT, J., in the first place, distinguishes between the two lines of attack upon such transactions as these, where he first of all says that the circumstances may be such that the company in question ought to be disregarded and treated as a sham. That was the case which was put forward before the commissioners in this case, and was negatived by them and in my judgment, properly negatived by them, having regard to their finding that the actual transactions were, in fact, legal transactions, namely, that the subscription by the Cliff Bridge Holding, Ltd., was a proper and legal subscription for shares in M. G. G., Ltd., and that the deed of covenant entered into by M. G. G., Ltd., was a legal deed of covenant. Then ROWLATT, J., goes on to refer to the other way in which the attack may be made upon such transactions by saying that the company or companies (I do not think it makes any difference that it is more than one company) is or are merely the agents of the corporators.

Mr. Latter drew my attention to the *Gramophone* case (4), where, I think, it was pointed out that "agency" in that sense means a very real agency, an agency in such circumstances that any person who had entered into a contract with the alleged agent could sue the alleged taxpayer as the undisclosed principal for that agent. As I have said, no such contention was put forward before the commissioners, and in view of the fact that no such contention was put forward before them, I do not think it is proper for me to make any finding upon that or to decide this case upon the basis of agency. I think I must accept the finding of the commissioners that the deed of covenant was not a sham. My attention was drawn to the *dictum* of LORD WRIGHT in the *Duke of Westminster's* case (5), at page 529, that the legal effect of a document is its substance, and that, therefore, on the principle that the substance and not the form is to be looked at, the substance of the transactions in

this case is that a deed of covenant was entered into which bound the respondent to pay the sum of £4,000 annually in return for the payment to him by the company of £19,100. For these reasons I am of opinion that I must uphold the decision of the commissioners in this case and the appeal will, therefore, be dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Macdonald & Stacey* (for the respondent).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

MENON *v.* MENON AND WARTH.

[Probate, Divorce and Admiralty Division (Sir Boyd Merriman, P.), **April 7, 1936**]

Divorce—Husband's petition claiming damages—Prior action for enticement settled on payment of damages—Assessment of damages in divorce petition.

A wife having finally left her husband and gone to live with the co-respondent in Jan., 1935, the husand on May 20, 1935, issued a writ for enticement. On May 23, the wife furnished the husband's solicitors with evidence upon which a petition for divorce could be based. On May 24 process in the enticement suit was served and on June 13 the action was settled for £500 agreed damages and costs. On July 4 the petition for dissolution was served, including a claim for damages. Upon the hearing of the petition the jury were directed that they must take into account the £500 accepted in the enticement action, as that was in substance much the same as the claim for damages in the petition. In doing so they must consider whether the £500 was intended to be in full settlement of all the husband's claims, or whether that sum was intended only to cover the heads of damage peculiar to an enticement action. If they came to the latter conclusion, they were entitled to award further damages. The damages in the action are based on the enticement but on the petition they are based on the adultery. The jury found that no damages should be awarded and judgment was entered accordingly.

[**EDITORIAL NOTE.** In view of the recent increase in the number of enticement actions and their almost necessary connection with divorce proceedings, this examination of the question how far the damages in these two matters are mutually exclusive is important.

For the Law of Damages in Divorce, see HALSBURY, Hailsham Edn., Vol. 10, pp. 748–750, paras. 1168–1175, and for Cases see DIGEST, Vol. 27, pp. 454–457, Nos. 4712–4748. For Enticement Actions, see HALSBURY, Hailsham Edn., Vol. 16, p. 611, para. 957, and for Cases see DIGEST, Vol. 27, p. 81, Nos. 640–643 and Supp.

Case referred to:

(1) *Place* v. *Searle* [1932] 2 K.B. 497; Digest Supp.

Petition for dissolution, in which there was a claim for damages, raising the question as to the effect to be given to their assessment by

the fact that the husband petitioner, as plaintiff, had already recovered a sum of money as damages from the co-respondent, as defendant, in an action for enticement.

William Latey (with him *A. C. D. Jackson*) for the co-respondent: Although there is a difference technically in the two claims, the basis of damages in both is the same, namely, the financial loss suffered by the husband through having been deprived of the wife's society and services.

R. Castle-Miller, for the husband, in reply to the court, did not contest that the same principles applied in both classes of action.

Sir Boyd Merriman, P.: Members of the jury, in this case I have found that the co-respondent has committed adultery with the wife, and that is the foundation of the claim which you have got to find—a claim for damages for that adultery. That, of course, is all that you are directly concerned with. But in discussing the question of damages, it is inevitable that frequent reference should be made to the vital fact that this enticement action was brought and was settled for this lump sum of £500 and costs. The two things are necessarily interlocked with each other, but I do want you to remember that all that you are being asked to do is to assess the damages for adultery in this divorce case. That is the verdict you will have to give. I am not going to direct you about enticement actions beyond saying this, which has got some point in this particular case. In *Place* v. *Searle* (1), McCardie, J., while holding in law the cause of action lay for enticing a wife, said it might easily develop into a recognised method of wrongful pressure and improper extortion. One of the questions which I think you may not unfairly consider is, if that is true with regard to enticement actions by themselves, whether it is also true of an attempt to duplicate an enticement action and a claim for adultery in the Divorce Court. Let me just give you in general terms a direction about the claim for damages here. Damages can be altogether apart from any claim for dissolution of marriage. Damages do not follow from adultery as a matter of course, and it is common knowledge that in this court claims for damages are comparatively rare. There is nothing discreditable about claiming damages, but anybody who seeks to claim damages must prove that there is a proper case for damages, and prove it upon the basis, not that you are punishing a man because he has committed adultery with the wife, but because the husband can put into an intelligible form before a jury that he has suffered some money loss as a result of the adultery which a jury can fairly assess in figures as a basis for a claim for damages. Amongst other things, of course, to be taken into consideration in the question of a claim for damages is the relations between the husband and the wife. Was this a perfectly happy home which was broken up by the actions of the adulterer, or was there already a state of things

which was not perfect, not the ideally happy married life. The actual relations between the husband and the wife you will naturally consider at the time when the co-respondent came upon the scene. Then we come back again to this question of the enticement action, because, as you now know the co-respondent has paid this sum in voluntary settlement between himself and the husband in respect of the enticement of the wife. Now, members of the jury, on the first day when you were here, I asked what was the difference as to the basis of assessment of damages against the co-respondent in the one case and in the other. I received on that occasion no very conclusive or satisfactory answer. You have been sitting there listening attentively to a further discussion on that subject this morning, and at the end of it all we now have an admission by counsel for the husband in this case that although, as is the fact, and as I shall direct you in law, the causes of action for enticement and for a claim for damages for adultery are not identical, yet there is in substance no difference between the bases on which damages in a divorce petition and in an enticement action might be assessed by a jury. I could not rule that the two causes of action are the same. Manifestly they are not, for this if for no other reason, that damages here must be based on the fact of adultery, and nothing else. They are ancillary to the charge of adultery. In an enticement action, adultery is not of the essence of the claim at all; it is the enticing away of the wife from the home which is the essence of the claim. The admission made by Mr. Castle-Miller, after discussion, was obviously right, because in substance there cannot be any difference between the two, in the circumstances of this case. Supposing the enticement action had come to a fight: Mr. Castle-Miller, addressing the jury, would have told them, and the judge would have told them, I think, that they were entitled to take into account that the enticement began by the co-respondent being introduced in the position of a lodger into the husband's house and offering to the wife, if he did, counter-attractions which he was able to pay for. Strictly speaking in every case the fact that the co-respondent is a rich man is of itself no basis for assessing damages at all. It is only the fact that it was the use of his wealth which seduced an otherwise faithful wife. It is one of the elements to be taken into account, because it throws light on the fact that she, so to speak, had to be bribed away before the co-respondent could get hold of her, and so forth. So indirectly in that way the use or abuse of wealth by the co-respondent does come into the matter, but in no other sense.

I have told you you are not punishing the man in either aspect of the case for adultery or enticement. You are assessing damages for the fact that he did commit adultery, which plainly would come in—it was said in the Court of Appeal—in the consideration of a common law jury in an enticement action, and that as a result of that adultery there has

been a baby. Then in particular, again common to both forms of action, there is the loss of the wife as a wife, and the loss of the wife as a mother. Well, on the one hand, the husband saves the expense of keeping the wife—on the other hand, he has to put his hand into his pocket to find somebody else to look after the children. All those things, quite manifestly, would come into the basis of the assessment of damages in the one case or in the other, and those are the sort of things which here you are entitled to take into account; that is, if you think they weigh.

Now you see the importance of that fact that these things are common to both cases. Bearing in mind an award of damages in the Divorce Court is not at all a matter for the court, you may wonder why you are being asked to give damages at all, when a sum has already been assessed between the parties in a case in which all these elements have been taken into account. Mr. Castle-Miller has told you no less than three times in this case that that £500—I do not think he put it quite so crudely as this, but I think he more than suggested it—represented ten years of the wages of this substitute for the wife. There is not a shred of evidence that is so, and I direct you that you cannot treat that £500 on that basis. That £500 was a voluntary settlement between the parties, agreed to by them for whatever was the claim in the action for enticement which, as I have already pointed out to you, is in substance admitted to have the same elements as are present in a claim for damages for adultery. You may ask yourselves, and I think it is a question you should most earnestly consider, when the husband has himself assessed those damages containing those elements at the sum of £500, why any jury should be asked to assess them in another form. That is what it comes to. Of course, if you think that that assessment of damages between the parties was so ridiculously out of proportion to the damages which you think ought to be awarded for adultery that they cannot possibly have been intended to cover the whole ground, that there is some ground that occurs to you which obviously was not taken into consideration or could not have been taken into consideration on that occasion, there is no reason in law why you should not award some sum for damages, provided always that you take into account the fact that £500 has already been received. It is a matter not so much of law as of common sense.

Now before I ask you to consider your verdict, I should also like to call your attention to this fact in connection with the dates in the case, because if it could be said that there was something at the time of the settlement of the enticement action which was not known, some grave element in the case which had been overlooked or concealed, then I can quite understand a jury taking the view that that cannot have been taken into account in the previous figure, and that some overplus must be awarded now in respect of the aggravated circumstances which were

not known at the time. But just consider this. On Jan. 11 the final breach occurred. It was known on that date that adultery had already been committed. It was known there had been an illegitimate child born and it was known that the co-respondent and the wife were going off to commit adultery again. All those things were known on Jan. 11, and on May 16 the wife was invited by letter—which for a technical reason you cannot read, but the substance of it is clear—to go to the husband's solicitors' office in order that she might furnish the evidence on which a petition for divorce could be based. You have heard the evidence in the witness-box. I cannot help thinking that your view of the solicitor's clerk's evidence, whatever that may be, may have some bearing on your view of the merits of this claim for damages, because on May 20 the writ and the statement of claim in the enticement action were prepared, they were ready. On May 23, in response to the invitation from the husband's solicitors, the wife called and took a messenger round to the place where they were living in an assumed name, in order that he might see for himself and obtain for himself the necessary evidence of adultery. Now that is three days after this enticement action was ready. Mr. Lynch, the solicitor's clerk, does not pretend that he told the co-respondent about it, and at first he said quite plainly, definitely and categorically that he had not told the wife about it, though he did say he had told the wife that there would be a claim for damages in the divorce petition. After, I think I am not saying unjustly, some contradictory answers, you may think that he saw what the implication of this was and then withdrew it and said he had told the wife both about the divorce claim for damages and about the enticement action before at their request she took him round to furnish him with the evidence on which a divorce petition could be based. You will form your own view of that young man's evidence, which, to put it plainly, is contradictory. You will form your own view as to whether there was or whether there was not something a little odd, when there was already in existence this claim for enticement, in getting an appearance for a corresponding claim for damages in the divorce action without telling the parties who were volunteering the evidence that it was intended to launch a duplicate claim. However, there it is. You will form your own view about that. It is not for me to say or to suggest what view you should take. There is the evidence about it. It is now common knowledge, at any rate, that it was not until May 24 when all the evidence had been obtained at their own instance, the wife and the co-respondent, that the enticement claim was served. The divorce petition was not then in existence, at any rate as far as the wife and the co-respondent are concerned, and on June 13 the enticement action was settled on the basis that what was being settled was the whole claim in all its aspects, a settlement of the whole of the enticement claim,

whatever the jury could have awarded. Did anybody know at that time that there was going to be a claim for damages in divorce? The divorce petition was not until July 4. Did the husband then intend, when he settled that enticement action, to claim damages here? If so, he did not tell the co-respondent. I do not know whether it will commend itself to you, for a man to accept a full settlement in one action without indicating that he proposes, in substance, to make the same claim again in another cause of action. It is a matter for you to consider whether that is the sort of thing which commends itself to you.

I end as I began, by telling you that a party who comes here claiming damages must satisfy you, in all the circumstances of the case, including on the one hand the fact that there are certain expenses which the jury might well be asked to take into account, that he is entitled to damages. A sum has already been accepted for something in substance which is very much the same claim. The party has, as I say, got to prove that. in all the circumstances of the case, he is entitled to damages. Unless he does that, there is no obligation on a jury to award them.

Now will you consider your verdict?

The verdict of the jury was that no damages should be awarded. A decree *nisi* was pronounced, with no order for costs.

Solicitors: *Lake & Son* (for the petitioner); *Wood & Wootton* (for the co-respondent).

[*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

NASH *v.* STEVENSON TRANSPORT, LIMITED.

[Court of Appeal (Lord Roche, Scott, L.J., and Eve, J.), **March 6, 1936.**]

Street traffic—Licence—Goods Vehicles—Right to licence—Agreement for use of name and tonnage—Illegality—Road and Rail Traffic Act, 1933 (c. 53), *ss.* 1 (1), (3), (8), 7, 8, 16, 21.

The plaintiff, being entitled under Road and Rail Traffic Act, 1933, s. 7 (2) to licences for goods vehicles up to a certain tonnage and not wishing to use such vehicles himself, agreed with defendants that, in consideration of a certain payment, they should operate the vehicles in his name and under his licences. All obligations as to keeping records, etc., were to be fulfilled by the defendants. By sect. 21 of the Act a licence under it is incapable of being transferred or assigned, and the contract provided that if it should be ascertained that the contract could not be performed legally, the consideration money should be returned :—

Held : the contract could not be carried out otherwise than illegally and was, therefore, void and unenforceable. It could not, however, be said, having regard to all its provisions, that it was an illegal contract.

[**EDITORIAL NOTE.** This decision is important, both from a practical and theoretical standpoint. The tendency to regulate many activities in modern life by licences and regulations makes a decision upon the indirect transferability of such a licence of interest. The theoretical distinction between an illegal contract and one lawful in itself, but only capable of performance by illegal means is not new. Here, however, we have what appears to be an illegal contract made a legal one by the insertion of a clause that, if it is found that it cannot be legally carried out, the consideration shall be returned. All the implications of these theoretical distinctions did not arise as the consideration had not been paid and the action was to enforce the payment of the consideration. Had the action been brought to obtain the return of the consideration money, it would have been necessary to resolve the question whether the contract was a lawful one, as some passages in the judgment of Lord Roche seem to suggest, or an illegal one as Scott, L.J., appears to have thought.

As to Illegal Contracts, see HALSBURY, Hailsham Edn., Vol. 7, p. 150, para. 213 ; and for the Cases, see DIGEST, Vol. 12, pp. 234-237, Nos. 1937-1948.]

Cases referred to :

(1) *Re Mahmoud and Ispahani*, [1921] 2 K.B. 716 ; 12 Digest 271, *2220*.

(2) *Waugh* v. *Morris* (1873), L.R. 8 Q.B. 202 ; 12 Digest 236, *1940*.

Appeal from a decision of Humphreys, J., in an action to recover a sum payable under a contract, the details of which are given in the judgment of Lord Roche, being a contract whereby the defendants in consideration of £350 were to operate goods vehicles under licences in the plaintiff's name. Humphreys, J., held that the agreement, though not in substance a transfer or assignment of the licences, could not be carried into effect without illegality and, the contract being therefore unenforceable, the plaintiffs could not recover the sum of £350 thereby agreed to be paid. The plaintiff appealed.

F. W. Beney for the appellant.

F. A. Sellers, K.C., and *Ian Macaulay*, for the respondents.

LORD ROCHE: The action arose out of an agreement between the parties, dated May 18, 1934. The general nature of the agreement and the circumstances in which it was made can be shortly stated. The plaintiff, before making the agreement, had certain motor vehicles running for him of a capacity of between 40 and 50 tons. Under the Road and Rail Traffic Act, 1933, s. 7, a person in the plaintiff's position, who previously, at material dates, had such vehicles running for the purpose of his trade, had the right, which was almost, if not quite, absolute, to have fresh licences granted to him to run a corresponding number of vehicles which would carry a corresponding or equal weight of goods. The plaintiff was going out of that business, and he was desirous of transferring, for a consideration of money, the benefit of those rights which he enjoyed under sect. 7 of the Act. For the purpose, if possible, of achieving that end this agreement was entered into. The consideration promised by the defendants was £375, and that is the amount claimed. The defence is that the agreement was impossible of execution legally and, therefore, that the agreement was void. I put it in another way: the consideration was irrecoverable because of that fact in connection with the agreement. HUMPHREYS, J., on that issue decided in favour of the defendants and gave judgment in their favour.

The agreement provided for the plaintiff's applying for the licences in question, as capable of being applied for by him under sect. 7 of the Act. It then provided that if the applications were successful the sum now in question should be paid, and certain provisions were made if there were a variation in the tonnage in respect of which licences were granted. Clause 7 of the agreement provided that the plaintiff should grant the company the use of the name of himself and the business name under which he formerly carried on business, in so far as it was necessary in connection with the running of the vehicles in respect of the licences so to be obtained, "and shall sign all necessary documents as may be required to that end." Then follow certain provisions providing for the payment back of the money if it were paid, "should it be ascertained that the company cannot in law and rightfully obtain the normal and proper use of the licences."

That being the agreement, it is now proper to turn to the Act. Sect. 21 of the Act provides: "Subject as hereinafter provided, a licence shall not be capable of being transferred or assigned," and then follows a proviso for a transfer under rules in a certain event or events, such as death, bankruptcy, and so forth, none of which events are now in question.

It was argued before the learned judge that, in so far as the object of the agreement was to achieve by other methods that which was forbidden under sect. 21, the agreement was unlawful, and the defendants had a good answer. So put, the learned judge was acting quite rightly,

in my opinion, in rejecting the argument, and in so far as any words have been quoted to us from *Re Mahmoud and Ispahani* (1), as supporting that argument, I think they were misunderstood. That is not really the valid objection to this agreement, nor is it the ground on which the learned judge decided. He decided that it was in terms and of itself incapable of being carried out otherwise than illegally. The argument for the appellant is that it could be carried out legally, that, accordingly, it must be deemed to be so carried out, and that therefore it is a lawful agreement. That argument is based on the well-known language of Blackburn, J., in *Waugh* v. *Morris* (2), at page 208. There the learned judge said as follows :

> We quite agree, that, where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to shew that there was the wicked intention to break the law ; and, if this be so, the knowledge of what the law is becomes of great importance.

It is not contended that the second limb of that statement fully applies. What is quite obvious is that these parties did not intend that the contract should be illegally performed. On the contrary, clause 8 intended that, should it be ascertained that the agreement could not be performed legally, £375 should thereupon be repaid by the plaintiff to the company. The money has not been paid at all, but that clause shows that it was plain that the parties did not intend illegal performance of the contract. The question is whether the contract could be legally performed at all. That depends on what the contract meant and bound the parties to do.

Mr. Beney has contended, in his very able argument, that the agreement could be lawfully performed because (*a*) the plaintiff could apply and did apply for the licences, and that when he had obtained them, as he did obtain them, he could run the vehicles. I have used that phrase as a compendious phrase—" run the vehicles "—as covering, in sufficient and popular language, the requirements of the Act. He is to be the person to run the vehicles. The question is : Did the agreement allow for the plaintiff, the licensee, running the vehicles, or did it, by its plain and express terms, involve that that was not to be the method of carrying out the agreement, but that the defendants, the other parties to the contract, were to be the persons running the vehicles, and that if they could lawfully do so, then the money should be due, and if they could not lawfully do so, then the money should be repaid ?

To determine and dispose of that question it is again necessary to look at the Road and Rail Traffic Act, 1933. Sect. 1 provides :

> (1) Subject to the provisions of this Part of this Act, no person shall use a goods

vehicle on a road for the carriage of goods—(*a*) for hire or reward; or (*b*) for or in connexion with any trade or business carried on by him, except under a licence;

and by subsect. (3):

When a goods vehicle is being used on a road for the carriage of goods, the driver of the vehicle, if it belongs to him or is in his possession under an agreement for hire, hire purchase or loan, and in any other case the person whose agent or servant the driver is, shall, for the purposes of this Part of this Act, be deemed to be the person by whom the vehicle is being used.

The result of those provisions is admittedly that if these vehicles were used or run by the defendants, and their servants drove the vehicles, then they, not being the licensees, would be committing a breach of sect. 1 of the Act of 1933 and would be liable for the penalties provided by subsect. (8) of that section. There are a number of other provisions, but it is sufficient, I think, to refer to those which relate to the conditions mentioned in clause 8 of the agreement, and in sect. 16 of the Act. Sect. 16 contains provisions relating to the keeping of records, and it is important to ensure that the provisions relating to the hours of work are being carried out. They are obviously of the greatest importance to the safety of the public who may be on the roads, since tired and over-tired lorry drivers are a public danger. The provisions of the Act to which I have referred involve that he who is running and using the vehicles shall be the employer of the persons who are driving or actually in charge of the vehicles, and he shall keep records in respect of the user of the vehicles and of the work of the persons in charge.

In my judgment, on a perusal of this agreement, it was the intention of the parties, or the words of the agreement involve, that the plaintiff should be out of the business, save that his name was to be used. I gather that, in particular, from clause 7 of the agreement, which stipulated that the plaintiff should grant the company the use of his name in connection with the running of any vehicles—which I am satisfied means the running of the vehicles by the defendants—and that the plaintiff should sign all necessary documents. I ask myself, as I asked Mr. Beney: Could the plaintiff have been obliged to engage these servants to drive these vehicles? The answer is: Certainly not. I do not agree with the expression which may be found in the judgment of HUMPHREYS, J.: "It was not contemplated that the plaintiff should be owner of the vehicles." The learned judge meant by that expression that he was not to be the beneficial owner. I think, however, that it was contemplated that the vehicles should stand in the name, the legal ownership, of the plaintiff, but I am satisfied that the learned judge was right in the residue of his conclusions, that the running of the vehicles, the supervision of drivers, the keeping of records, and all the matters which were the obligation of the licensee, were to be done by the defendants, and not by the plaintiff. And I am satisfied also that

they were not even to be done by the plaintiff for the defendants. In those circumstances, in my opinion, the conclusion of the learned judge was abundantly right—that the very nature of the agreement, the very language of the agreement, merited that it was to be carried out in that manner and that that manner was unlawful. It therefore follows that the agreement was not binding, and I think from what I have said that the parties intended that if the agreement could not be carried out in a lawful manner it should not be binding. Whether they intended it or not, if the result is that the agreement could only be carried out in an illegal manner, contrary to the terms of the Road and Rail Traffic Act, 1933, it follows that it cannot be successfully sued on at law, and the decision of the learned judge to that effect is right. I am therefore of opinion that the appeal should be dismissed, with the usual consequences.

Scott, L.J.: The Act clearly contemplates that the licensee, when he asks for a licence and, I think, while he holds the licence, remains the owner of the vehicles in respect of which he gets his licence. The measure of the licence is the unloaded weight of the vehicles which he is to be allowed to have. In the case of vehicles which have been running previously to Mar. 31, 1933—twelve months from Apr. 1, 1932—the granting of a licence to the owner of those vehicles is obligatory under sect. 7, but I think it is quite clear this contemplates that the licensee should be the owner. It is also, in my view, contemplated that the public duty of seeing that the conditions on which licences are granted contained in sect. 8—which relates to the vehicles' fitness and the vehicles' serviceableness—and in sect. 16—which relates to the records of hours of service of the men actually driving them—should be discharged by the licensee. He can only discharge those duties if he remains in control of the vehicles, or, to use the words of the judgment, if he is running them, and, in my view, it is essential that the licensee should retain in his own hands the effective control over the running of the vehicles in respect of which he has the licences. I do not myself think it is necessary to discuss the terms of the Act any further for the purposes of this case.

In my view, as Lord Roche has already said, the agreement contemplates that the running of the vehicles should be a running not by the licensee but by a company which was not licensed. That, to my mind, is the only possible interpretation of the agreement as a whole in the light of the circumstances in which it was made and, in particular, of clause 7 of the agreement. If the Act contemplates the owner retaining control to ensure the performance of the conditions of the licence—the conditions imposed by the Act under sect. 8 and 16—then it will be absolutely essential that his name as licensee should remain and that he personally should be responsible for the running of the vehicles.

Clause 7 of the agreement in effect, in my opinion, says this : The plaintiff is selling his rights because he is going out of business ; what he wants to get is the £375 ; he agrees that if it is necessary, for the purpose of preserving the licence to which he is entitled, that his name should still appear in connection with the running of the business, then he agrees that his name shall be used in that kind of way and that he will sign any documents. In my view, that was put in just because he was not going to have the running of the business himself, and one cannot attach any reasonable meaning to the clause, except that. If that is so, then the agreement was quite definitely an agreement for the purpose of doing that which is prohibited by the Act, and that would make the agreement illegal.

There is the further point arising out of the earlier correspondence which was read, having been treated before the learned judge as part of the evidence in the case, from which I think the conclusion is that the plaintiff was going out of business and, wanting to sell the goodwill of the licences to somebody else, he must not intend to have anything more to do with the operation of the vehicles which were going to be allowed to run under those licences. That, to my mind, would be directly contrary to sect. 1 (1) of the Act, which says : "No person shall use a goods vehicle on a road for the carriage of goods—(*a*) for hire or reward ; or (*b*) for or in connection with any trade or business carried on by him, except under a licence." If the meaning of that is, as I think it is from the other sections of the Act, that the licensee must be the person who is running the vehicles, then the intention on the part of the plaintiff was an intention to use the agreement with the company for the purpose of doing or assisting in an act prohibited by the statute, and that, to my mind, apart from the interpretation of the agreement, will constitute a transaction with an illegal object within the meaning of the cases and make the money irrecoverable under the agreement in any event.

EVE, J. : I think that this is a plain case, and the appeal should be dismissed with costs.

Solicitors : *Ernest C. Randall* (for the appellant) ; *Field, Roscoe & Co.*, for *Luya & Williams*, Liverpool (for the respondent).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

JAMES HOLLAND RICH *v.* LONDON PASSENGER TRANSPORT BOARD.

[Court of Appeal (Lord Wright, M.R., Romer, L.J., and Charles, J.)
April 1, 2, 1936.]

Public Authorities—Compensation for loss of office—Limit of amount of compensation—Annuity or lump sum—Option of officer—Pensions Commutation Acts, 1871-1882—*London Passenger Transport Act*, 1933 (*c.* 14), *s.* 73 (6), *Sched.* 14.

In assessing compensation for loss of office under the London Passenger Transport Act, 1933, s. 73 (6), the Standing Arbitrator may award compensation either in the form of a lump sum or an annuity. The recipient of the compensation has no option and cannot insist upon the award in either form. If a lump sum is awarded, the arbitrator may apply any actuarial tables that he thinks fit, provided that the total sum awarded does not exceed the sum which could have been awarded to a civil servant under the provisions of the Acts and regulations in force on Aug. 13, 1888, i.e., the regulations made by the Treasury on July 27, 1871.

[EDITORIAL NOTE. The proviso construed in this case has been quite frequently incorporated in schedules dealing with compensation for loss of office, and now that its provisions have received judicial construction, it will probably be used in other cases where reorganisation and centralisation lead to that result.

As to Compensation for Loss of Office, see HALSBURY, 1st Edn., Vol. 23, Public Authorities, pp. 352–355, paras. 713–722, and for Cases, see DIGEST, Vol. 38, pp. 139–143, Nos. 1031–1063. For the Pensions Commutations Acts, 1871–1882, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 16, pp. 273, 379, 531, and for London Passenger Transport Act, 1933, see Vol. 26, pp. 807, 867.

Appeal from the decision of Mackinnon, J., on an award in the form of a special case by the Standing Arbitrator appointed under the the London Passenger Transport Act, 1933. The appellant before July, 1934, was the managing director of the Westminster Omnibus Company, Ltd. Under the Act the omnibuses of the company were taken over by the Transport Board on the appointed day, July 11, 1934. The appellant's remuneration from the company was something over £650 per annum. The Board offered him a post in their organisation at a considerably lower salary, which he refused. He subsequently made a claim for compensation under sect. 73 of the Act. The Standing Arbitrator awarded him £130 per annum for life and at the same time stated a special case for the opinion of the High Court raising various points of law. The case was considered by MacKinnon, J., and this appeal was brought from his decision on two of the questions submitted :—

(i) May the arbitrator at his discretion either award an annual sum or a lump sum, or can he be called upon as of right by the claimant to do either one or the other.

(ii) What scale should the arbitrator apply when he has arrived at an annual payment for compensation and desires to turn it into a lump sum.

The London Passenger Transport Act, 1933, Sched. 14, para. 4, considered in the judgments is as follows :

For the purpose of determining whether compensation should be granted to any person under the provisions of this schedule, and if so, the amount of that compensation, regard shall be had to—

(*a*) the nature of his office or employment ;
(*b*) the conditions upon which his appointment was made ;
(*c*) the duration of his service ;
(*d*) any additional emoluments which he acquires by virtue of this Act, or of anything done in pursuance or in consequence of this Act ;
(*e*) the emoluments which he has, or might have, acquired by accepting other employment offered him by the Board, or by the authority, company or person from whose service he was transferred to the Board ; and
(*f*) all the other circumstances of his case :

Provided that in no case shall the compensation payable exceed the amount which under the Acts and rules relating to Her Majesty's civil service and in force on Aug. 13, 1888, would have been payable to a person on abolition of office.

A. S. Comyns Carr, *K.C.*, and *Sir George Jones*, for the appellant. The provisions of the London Passenger Transport Act as to compensation for loss of office to be awarded to officers or servants of transferred undertakings are the same as those under the Local Government Act, 1888, sect 120. The plan is that the persons to be compensated should be treated as though they were civil servants. A civil servant had a right to an annuity on retiring, and a right to commute it, but the Treasury could not commute it for him against his will. Even after he had applied to commute he was entitled to refuse the sum offered and retain his pension. Here the arbitrator can never award a lump sum except on the application or at least with the consent of the transferred officer. The proviso limiting the compensation can only apply to an annual sum.

W. Monckton, K.C., and N. R. Fox-Andrews for the respondents. The arbitrator can award a lump sum or an annual payment at his discretion. Having done one or the other the matter is finished.

Lord Wright, M.R. : This appeal comes before this court under very unusual circumstances, and the court, in hearing it, has been guilty of a certain irregularity, but has done so in the hope that it will save difficulty to the parties, and at the request of the parties. An arbitration was held before the standing arbitrator under the London Passenger Transport Act of 1933. The question at issue was the proper amount of compensation payable under sect. 73 (6) of the Act, and under the relevant provisions of Sched. 14. The applicant in that case was a Mr. Rich, and various points were raised before the arbitrator, and stated by the arbitrator in the special case which he stated. Most of these points have not even been mentioned to this court, but two points have been raised and argued. The curious feature is that neither of

these points is material as matters have turned out, so far as Mr. Rich is concerned, or so far as the proceedings under the special case are concerned. The parties have represented to this court that they desire to have a decision on two matters in order to guide them in respect of pending matters. These two matters are, first of all, whether an applicant who comes before an arbitrator in a proceeding of this nature has an option to require the arbitrator to award him either an annual sum—what is generally called a pension—or a lump sum. The learned judge has held that there is no such option in the applicant, but the arbitrator has a discertion when the matter comes before him to award either an annual or a lump sum, and that that is a matter for his discretion. That point has been raised and argued before this court. The other point has reference to the amount of compensation which may be awarded to an applicant, and for this purpose, quite outside the special case, the court have had a specific case put before them, a case which is now in suspense, the case of Mr. Miller, of the Miller Traction Company, Limited. In respect of his case, as I believe in respect of a great many other cases of which a schedule has been given to us, an agreement has been arrived at. Under that agreement the actual amount of the compensation, which, of course, depends on the principles on which it is to be awarded, has been provisionally fixed, subject to a variation in the event of this court deciding in a particular way.

I will now deal with the quite general question, which is the first of these questions, and I may say at once that I agree with the decision of the learned judge, which is carefully expressed in this way :

> I think it is within the power of the arbitrator, under that provision, at his discretion either to award an annual sum or a lump sum, and I do not think that he can be called upon, as of right, by the claimant to do either the one or the other. The claimant cannot say : "You must award me a lump sum," or "You must award me an annual sum"; nor do I think that if an annual sum be awarded to him the applicant would have the right to insist upon its commutation by reason of the provisions applying to the civil service under regulations issued by the Treasury under the Pensions Commutation Acts, 1871 to 1882. The reference to the position of civil servants is solely in the proviso to para. 4 of the schedule, and it is merely to fix a maximum beyond which the amount of the compensation shall not go. I do not think that that imports into this schedule a provision that claimants for compensation shall have any of the rights of civil servants with regard to the commutation of their pension.

I entirely agree with that, and I think that the learned judge was quite right in finding in the words : "the amount of that compensation" words which gave an untrammelled discretion to the arbitrator to award the amount which is expressed in general terms, and subject to no such limitation as, apparently, it was sought to import in it from what I regard as a misreading of the proviso. In saying so I am assuming, as I must assume for the purposes of this case, that under para. 4 of the schedule

the arbitrator has power either to award a lump sum or an annual sum. The learned judge assumed that, and looking at the notice of appeal here it is perfectly clear that no one was questioning that he was right on the construction of that paragraph in so assuming. I confess that I am disposed to think that he was right, and I think at this moment, if it were necessary, I should so decide ; in other words, that the amount of that compensation covers either alternative, as the learned judge held. However that may be, it is perfectly clear to my mind that no question to the contrary was before the learned judge. It was assumed before him that that was the true construction, and the notice of appeal does not suggest any other view. Therefore I proceed here on that assumption.

It is important to make that clear when I come to consider, as I do next, the proviso on which most of the argument here has ranged. The question which arose under that proviso is : If a lump sum is being awarded, what is the limitation, if any, imported into the jurisdiction of the arbitrator, or the discretion of the arbitrator, in fixing the amount of that lump sum ? The proviso is in these terms :

> Provided that in no case shall the compensation payable exceed the amount which under the Acts and rules relating to Her Majesty's civil service and in force on Aug. 13, 1888, would have been payable to a person on abolition of office.

In my judgment that proviso relates simply and solely to a limit of amount. It in no way specifies how the arbitrator is to proceed in exercising his statutory discretion under the main part of the paragraph. He has to ascertain the amount of that compensation. If he is going to award merely an annual payment then he will have to take into account the various conditions which are set out in items (*a*) to (*f*) of para. 4. If he goes further, because he has determined to award a lump sum instead of an annual payment, then he will have to apply some table of lives to the sum which he has so ascertained. There are two steps in the proceeding, but there is no direction here to the arbitrator to apply any particular actuarial life tables. All that is left to him, and in choosing what he thinks fit for this purpose he will arrive at the lump sum which he would be prepared to award, and then the proviso comes in. If that lump sum exceeds what the proviso specifies then that lump sum must be reduced accordingly. Therefore it is essential to see what exactly is meant by the proviso. The proviso refers to " Acts and rules relating to Her Majesty's civil service, and in force on Aug. 13, 1888," and the question then is : What, under those Acts and rules, would have been payable to a person on abolition of office ? The first of the Acts in question, beyond doubt for this purpose, is the Act of 1859, ss. 2 and 7. Sect. 7 deals with grants of compensation in the way of a superannuation or allowance in the case of abolition of office. That

is the Act of 1859, which deals only with pensions, or annual payments. It is to the Act of 1871 that it is necessary to turn in order to find the provisions applicable to civil servants for the grant of a lump sum. That Act applies to persons who have retired, or who have been removed from the public offices in consequence of the abolition of their offices, or for other purposes. Sect. 4 of that Act provides :

> It shall be lawful for the Treasury, in accordance with such regulations as they may from time to time make, on the application of any person to whom this Act applies, to commute his pension by the payment of a capital sum of money, calculated according to the estimated duration of the life of the pension-holder ;

and then there are certain minor provisions with which I need not trouble. Sect. 7 deals with the method of calculating according to the estimated duration of life, and it says :

> Subject to the provisions of this Act, the Treasury may from time to time make, alter or revoke regulations as to the following matters : (2) The tables according to which the duration of life of applicants for commutation is to be calculated for the purposes of this Act.

The first question which was raised by Mr. Comyns Carr was that there were, in fact, no regulations in existence in 1888 as to the tables according to which the duration of the life of the applicant for commutation should be included, but I do not think that it is possible to accept that contention. It is perfectly true that it was only at a later date that tables were promulgated by regulations formally made, or, at least, of which evidence has been given by the production of a statutory rule and order. The one in question is S. R. & O. 1913, No. 972. When that is looked at it contains a term :

> The regulations made by the Treasury on July 27, 1871, prescribing the table on the basis of which commutation was to be calculated . . . are hereby revoked

so that there is a statutory reference to a prescription by the Treasury of the appropriate table. The Treasury have written to the appellant's solicitor saying :

> The commutation table applicable to civil servants who retired on Aug. 13, 1888 in consequence of the abolition of their offices was that prescribed in 1871, under the Pensions Commutation Act, 1871, and was stated to be subject to an addition of years of age in the case of impaired lives,

and the table has been produced. That, in my opinion, is the table under the relevant rule referred to in the proviso. The court must assume that if tables were prescribed they were prescribed by a regulation duly made under sect. 7 of the Act of 1871, and, indeed, that is recited as a fact in the statutory rule and order to which I have referred, so that now we get the Acts, and we get the rules. Having got the Acts and the rules and examined them, it is next argued that the Acts and rules here

only fix a limit in respect of annual payments and refer to no limit at all if what is ordered, or what is being dealt with, is a lump sum. I cannot accept that limitation at all. I am proceeding on the assumption, which I think is the correct assumption, that the amount of the compensation under Sched. 14, para. 4 has reference either to a lump sum compensation or to an annual payment, and it would be very strange indeed if the proviso, which *prima facie* would apply to either alternative under para. 4, dealt only with one of these alternatives and was quite silent as to the other alternative, the lump sum compensation, but I do not see any ground at all for so limiting para. 4. The Acts and rules in my opinion deal both with lump sum payments and with annual payments, and both of these come within the terms of the proviso. It is said in the proviso that the compensation pavable—that is payable under the paragraph—is not to

exceed the amount which, under the Acts and rules relating to Her Majesty's civil service and in force on Aug. 13, 1888, would have been payable to a person on abolition of office.

The words "on abolition of office" I think correspond with the words in the definition in the Pensions Commutation Act, 1871, s. 3 (2): "in consequence of the abolition of their offices," and I think that those words of the proviso introduce and include these provisions It is said, however, that that is not so, because it is said that there is an entirely different procedure under the Acts of 1857, 1859 and 1871. It is said that under the Act of 1859 there is provision only for annual compensation, that is to say for pensions, and that it is only when annual pensions have been granted and allowed under the Act of 1859 that at a subsequent stage and in a further proceeding a question may arise of commuting those annual payments. It is said that that can only be done by the Treasury on the application of any person who has got a pension and that on that application the grant of the commutation is at the discretion of the Treasury. That is all perfectly true, but for the purpose of the proviso it merely shows the machinery which has to be followed in dealing with cases under the Civil Service Acts. For the purpose of the proviso, what the arbitrator is concerned with in ascertaining the limit which he must apply is not the machinery, but the substantial process. He has to ascertain what compensation—that is to say either an annual payment or a lump sum—would have been payable in a case where by the appropriate machinery the matter had been dealt with under those two Civil Service Acts, in other words, the machinery is, for this purpose I think, quite irrelevant. There is here a case in which compensation is payable to a person on abolition of office, and the only question under the proviso is what is the limit to be applied. I think that that limit is quite clearly conveyed on the assumptions which I have stated by the language of the proviso.

The result is that the arbitrator is perfectly untrammelled, subject to the provisions of para. 4 in arriving at the annual payment. He is left to choose what table of lives he thinks fit to apply, but when he has done that, I think that the result must be subject to the limit in the proviso, and one of the matters which determine the limit in the proviso is that there must be applied, in order to ascertain that limit, the table in force in 1888, which is the table prescribed by the Treasury in 1871.

I think that that answers the two questions which have been put in this court in a somewhat irregular way. I may say at once that the court is really acting extra-judicially in taking the course which it has done, but it has done it at the request of and in order to help the parties.

Romer, L.J.: If we had to decide the question whether an arbitrator, under the London Passenger Transport Act, 1933, Sched. 14, had power to award as compensation to a person whose office was abolished a lump sum, or whether he had power only to award an annual sum, I should have desired to hear Mr. Monckton further upon the subject, and for this reason, that para. 4 of the schedule in question, referring to compensation, and indeed sect. 73 of the Act, which is the section giving a right to compensation are in terms wide enough, if read without the proviso to para. 4, to give power to the arbitrator to award a lump sum or an annual sum at his discretion. The proviso, however, does seem to me to create a real difficulty which might or might not be resolved in his favour by Mr. Monckton had I had the pleasure of hearing him on the subject, because that proviso says:

> Provided that in no case shall the compensation payable exceed the amount which under the Acts and rules relating to Her Majesty's civil service and in force on Aug. 13, 1888, would have been payable to a person on abolition of office.

The question at once arises as to whether the sum which was payable, or which would become payable if the Treasury thought fit so to do, on commuting a pension payable under sect. 7 of the Act of 1859 can properly be described as a sum "which would have been payable to a person on abolition of office." If one looks at the Act of 1871, which authorises the Treasury, on the application of a pensioner, to commute the pension, there is ground for thinking that what is payable under that Act by way of commutation is not a compensation for retirement or loss of office, but is merely a sum which the person to whom compensation has already been awarded is enabled to realise by a disposal of the annual sum so awarded. That point is not open to Mr. Comyns Carr on the notice of appeal, and we must decide this case on the assumption that the arbitrator has power to award either a lump sum or an annual sum. If he can award a lump sum, it must be, as it seems to me, because a sum awarded by way of commutation under the Act of 1871 can properly be described as being a sum "payable to a person

on abolition of office." If that be so, it seems to me that the decision at which the learned judge has arrived is obviously right and accordingly this appeal fails.

CHARLES, J.: I entirely agree with the judgment delivered by my Lord. I do not share, if I may say so respectfully, the doubts that are expressed by ROMER, L.J., upon the point which he has just developed I do not desire to add anything further.

Solicitors: *J. R. Cort Bathurst* (for the appellant); *Bircham & Co.* (for the respondents).

[*Reported by* C. ST. J. NICHOLSON, *Barrister-at-Law.*]

METROPOLITAN COAL CO., LTD. *v.* PYE.

[PRIVY COUNCIL (Viscount Hailsham, L.C., Lord Thankerton, Lord Maugham, Sir George Lowndes, Sir Sidney Rowlatt), **March 6, 27, 1936.**]

Master and servant—Workmen's compensation—Disease arising out of and in course of employment—Onus of proof—Disease due to silica dust—Workers' Compensation Act, 1926-1929, *ss.* 5-7 (*New South Wales*).

The Workmen's Compensation (Silicosis) Act, 1920, No. 13 (New South Wales) as amended by the Workers' Compensation Act (New South Wales), 1926-1929, and by the scheme made by the Minister thereunder makes provision for the payment of compensation by employers of workmen in certain specified industries involving exposure to silica dust who suffer death or disablement from diseases caused by exposure to silica dust. Coalmining is not included in the industries.

The respondent was an employee in the coalmine of the appellants and was partially incapacitated by a disease caused by the inhalation of dust. It was found as a fact that there was not sufficient evidence that the disease was due to silica dust. An award of compensation was made, and the employers appealed:—

HELD: the Act does not apply only to a category of cases restricted *in limine* by the omission of disease caused by silica dust; but the intention is to provide for compensation in every case of injury. The latter is the paramount intention, and the provisions with relation to disease caused by silica dust is an exception out of the general scheme. The burden was therefore upon the mineowners to prove affirmatively that the disease was due to silica dust.

[**EDITORIAL NOTE.** Though the terms of the Australian enactment are not quite in the same words as the English enactment, there is sufficient similarity in the wording of the two Acts to make this case of interest and importance in both countries and also in other dominions and colonies where such legislation is in force. It would appear that, *prima facie*, such legislation is intended to provide for every accident arising out of and in course of the workmen's employment, and to leave no gap where the workmen is unprotected.

FOR THE SCOPE OF THE WORKMEN'S COMPENSATION ACT, see HALSBURY, 1st Edn., Master and Servant, Vol. 20, p. 153, para. 326, and Supp.; and FOR CASES, see DIGEST, Vol. 34, pp. 238, 239, Nos. 2030-2042.]

APPEAL from a decision of the High Court of Australia reversing a decision of the Supreme Court of New South Wales in a case stated

under the Workers' Compensation Act, 1926–1929, s. 37 (4) at the request of the appellant company, by the Workers' Compensation Commission of New South Wales. The case is solely concerned with the general scope of the Workers' Compensation Act, 1926–1929.

N. L. C. Macaskie, K.C., and *Valentine Holmes* for the appellants.

E. W. Cave, K.C., and *W. Shakespeare* for the respondent.

The judgment of their Lordships was delivered by Sir Sidney Rowlatt.

Sir Sidney Rowlatt: The only question for determination is whether an applicant for compensation under the Workers' Compensation Act, 1926–1929, must in order to establish his claim not only prove that he has contracted a disease arising out of and in the course of his employment, but go on to prove that it was not caused by silica dust (in which case the employer would not be liable) or whether it suffices for him to prove the first proposition only, leaving it to the employer to show, if he can, that the disease was due to silica dust. It is a short though important question of construction relating to the onus of proof. The directly relevant sections are as follows :—

Section 7 (1).—A worker who has received an injury whether at or away from his place of employment (and in the case of the death of the worker, his dependants) shall receive compensation from his employer in accordance with this Act.

Section 6 (1).—In this Act unless the context or subject-matter otherwise indicates or requires . . . "Injury" means personal injury arising out of and in the course of the employment and includes a disease so arising whether of sudden onset or of such a nature as to be contracted by gradual process other than a disease caused by silica dust.

Section 5.—Nothing in this Act shall affect the operation of the Workmen's Compensation (Silicosis) Act, 1920 as amended by this Act. . . .

By the Workmen's Compensation (Silicosis) Act, 1920, as amended by the Workers' Compensation Act, 1926–1929, and by the scheme made by the Minister thereunder, provision is made for the payment of compensation by the employers of workmen in specified industries and processes or groups of industries and processes involving exposure to silica dust who suffer death or total disablement or partial disablement from diseases of the pulmonary or respiratory organs caused by exposure to silica dust. "Coalmining" is not included in the industries or processes or groups of industries or processes specified in such Act or the scheme made thereunder.

The appellant company owns and works coalmines situated in New South Wales, and the respondent was formerly employed by the appellants as a miner in one of their coalmines. On Mar. 6, 1933, the respondent filed an application for compensation which was heard by the commission, being the appropriate tribunal under the Acts, on May 11–12, 1933. On behalf of the respondent there was put in evidence a certificate by a medical board (which by sect. 51 (3) of the Act is conclusive evidence

as to the matter certified) stating that the respondent had "a partially incapacitating pulmonary fibrosis which could be due to coal dust." The respondent also called two radiologists who had made X-ray examinations of his lungs, and three other medical men. The result of their evidence was that the radiograph showed pneumonoconiosis, there being a mottling on the lungs, which meant fibrosis, and fine particles of dust, and that the condition observed might be brought about by silica dust or other dusts. The appellants called no evidence and submitted that there was no case to answer.

On May 12, 1933, the commission found :—

(1) that the incapacity for work of the applicant [the respondent herein] since April 27 has been and still is partial ;

(2) that the applicant's partial incapacity for work is due to pulmonary fibrosis and results from the inhalation of dust in the respondents' [the appellants herein] coalmine ;

(3) that the disease which partially incapacitates the applicant for work is of such a nature as to be contracted by a gradual process, and his employment with the respondents was employment to the nature of which the disease was due ;

(4) that on the evidence before it the commission is not satisfied that the partial incapacity for work of the respondent results from a disease caused by silica dust.

On these findings they awarded compensation to the respondent, and at the request of the appellant company stated a case for the Supreme Court of New South Wales.

Carefully reasoned judgments were delivered in both courts below but their Lordships do not think it necessary to examine these in detail. The majority in the Supreme Court of New South Wales and the minority in the High Court of Australia acted on the view that the Workmen's Compensation Act applied only to a category of cases restricted *in limine* by the omission of cases of disease caused by silica dust. That, in the opinion of their Lordships, is to mistake the scope of this legislation. The intention of the Act as appearing from sect. 6 (1) is to provide for compensation in every case of injury (including disease) arising out of and in the course of a workman's employment. In the language of RICH, J., we have in the Workmen's Compensation Act, 1926-1929, a general law for compensating such injuries. That is the paramount enactment, and to give effect to it the words "other than a disease caused by silica dust" must be read as inserted not to limit it, but to prevent it being appealed to in particular circumstances where the relief would overlap that provided by a special and narrower scheme. Till such overlapping appears, its operation is unaffected. To hold otherwise would have the result that where, as in this case, medical evidence shows that the disease is due to dust but cannot specify the kind of dust, the workman is left without any compensation at all though undoubtedly suffering from a disease arising out of and in the course of his employment. This is to leave a gap which destroys the intended completeness of the

scheme. Their Lordships do not overlook the circumstance that coal-mining is not an industry brought within the operation of the Act dealing with silicosis. The result, no doubt, is that if disease in a coalminer is affirmatively proved to be due to silica dust the workman is left unprotected; and in that case the two schemes together do not cover the whole of the ground. The coalmining industry may have been omitted from the silicosis scheme because it was not contemplated that pulmonary disease contracted in a coalmine could ever be definitely attributed to silica dust in particular. The medical evidence in this case suggests that possibility. It is, however, unnecessary to speculate upon this point. The construction of the Act in its general application cannot be affected by the omission of this particular industry from the complementary legislation.

It only remains to add that basing their conclusion upon the scope and intention of the Act, their Lordships do not find it necessary to examine the decisions referred to in the judgments in the court below and in the arguments before this Board in which the effect of different forms of language upon the onus of proof has been discussed upon general principles. For these reasons their Lordships will humbly advise His Majesty that the appeal be dismissed. The costs have been provided for by the order granting special leave to appeal.

Solicitors: *Bell, Brodrick & Gray* (for the appellants); *Pattinson & Brewer* (for the respondent).

[*Reported by* S. P. Khambatta, Eso., *Barrister-at-Law.*]

WHITE *v.* ALTRINCHAM URBAN DISTRICT COUNCIL.

[COURT OF APPEAL (Slesser, Greene and Scott, L.JJ.), **March 31, April 1, 7, 1936.**]

Master and Servant—Workmen's compensation—Costs—Discretion of judge to order payment into court—Review of taxation—Limitation of power of judge to vary quantum of costs taxed by registrar—County Courts Act, 1888 (*c.* 43), *s.* 118—*Workmen's Compensation Act*, 1925, (*c.* 84), *Sched. I* (7) —*Workmen's Compensation Rules*, 1926, *rr.* 8, 29, 76, 78—*County Court Rules, Ord.* 53.

A workman alleged that by reason of injuries sustained at work he was suffering from neurasthenia. At the hearing he applied for leave to amend the particulars of his application by including a statement that he had suffered an injury to his brain structure. The judge gave leave to amend, but granted an adjournment to the employers and ordered that, before the case could be again set down for hearing, the workman should bring into court the costs thrown away by the amendment and adjournment.

The registrar, in taxing these costs, allowed three guineas each for three medical witnesses called by the respondents. The judge, on review, increased these amounts to seven guineas each :—

HELD : (i) the judge had complete discretion to order an amendment on conditions as to costs ;

(ii) the judge had no power to overrule the decision of the registrar in the proper exercise of his discretion as to the *quantum* of costs.

EDITORIAL NOTE. The first appeal gives occasion for the suggestion that an order requiring a workman to bring costs into court is likely to work considerable hardship and might in cases amount to a denial of justice. The judgments, however, deal mainly with the second appeal in which a judge increased the amounts of certain fees allowed to doctors. After fully considering the Act and rules and the authorities, all members of the court were clearly of opinion that this is beyond the power of the judge. The *quantum* of such fees is purely the province of the registrar who is the taxing authority of the county court.

AS TO REVIEW OF TAXATION OF COSTS, see HALSBURY, Hailsham Edn., Vol. 8, pp. 372, 373, paras. 801, 802 ; and FOR THE CASE, see DIGEST, Vol. 13, p. 524, No. 743. FOR THE CASES ON REVIEW OF TAXATION IN THE HIGH COURT, see DIGEST Practice, pp. 954-957, Nos. 4943-4974 ; FOR THE COUNTY COURT RULES, ORD. 53, see YEARLY COUNTY COURT PRACTICE, 1936, p. 548 ; AND FOR THE WORKMEN'S COMPENSATION RULES, 1925, see *ibid.*, p. 807.]

Cases referred to :

(1) *Aisop* v. *Oxford* (*Lord*) (1833), 1 My. & K. 564 ; 42 Digest 214, *2390.*

(2) *Ogilvie, In the Estate of, Ogilvie* v. *Massey*, [1910] P. 243 ; 42 Digest 216, *2430.*

(3) *Slingsby* v. *A.-G.*, [1918] P. 236 ; 42 Digest 150, *1483.*

(4) *Re Catlin* (1854), 18 Beav. 508 ; 42 Digest 216, *2423.*

(5) *Re Ermen, Tatham* v. *Ermen*, [1903] 2 Ch. 156 ; Digest Practice 947, *4873.*

(6) *Hill* v. *Peel* (1870), L.R. 5 C.P. 172 ; 20 Digest 180, *1581*

APPEALS by a workman against two orders made by His Honour JUDGE WHITMORE RICHARDS at the Altrincham County Court on Nov. 6, 1935, and Jan. 8, 1936.

(1) A workman who had been run over by a lorry at work claimed compensation on the ground that his injuries had resulted in neurasthenia.

At the hearing he desired to amend the particulars of his application to allege alternatively that he had suffered injury to the structure of his brain. The learned judge adjourned the hearing to allow the employers time to meet the new case, and ordered the workman to pay into court the costs thrown away by the amendment and adjournment before the case could be set down again for hearing. The workman appealed on the ground that the judge was wrong in law in imposing this condition, and had no jurisdiction to impose it.

(2) When the learned registrar taxed the costs so thrown away, he allowed the fees of three medical witnesses at three guineas each. On Jan. 8 the learned judge, on review, held that these amounts were insufficient and increased them to seven guineas for each of the three witnesses. The workman appealed on the ground that the judge had no power to disturb the discretion of the registrar as to the *quantum* of taxed costs, unless that discretion had been improperly exercised.

C. H. Spafford for the appellant workman: (1) The learned judge must do justice between the parties, and by making it a condition of the amendment that the workman must bring the costs into court, he made it impossible for the workman to place the true facts before the court.

(2) The judge allows the scale of fees, but the registrar fixes the *quantum* at his discretion. Unless it is shown that the registrar has considered matters which he should not have considered, or failed to consider matters which he should have considered, the judge has no jurisdiction to vary the sums allowed by the registrar.

E. W. Cave, K.C. and *R. R. Smylie* for the respondent employers: (1) As the judge had complete power to refuse to allow amendment, he could impose what conditions he thought proper.

(2) The review was a rehearing, and the learned judge had complete power to allow any sums he saw fit.

Slesser, L.J.: These appeals, arising out of the same facts, can conveniently be dealt with in one judgment. The applicant, in his request for arbitration, alleged that on Dec. 15, 1930, while he was walking alongside a horse and lorry, the horse reared and the applicant was crushed between the shafts and run over by the lorry. He was totally incapacitated for work until June, 1931, and then worked until Mar., 1935, when he became totally incapacitated again. He claimed compensation from Mar. 7, 1935, on the basis of total incapacity. The respondents denied that he had been incapacitated since Mar. 6, 1935.

The nature of the injuries alleged in 1930 was various wounds, crushed chest, back and right foot, and bruised and lacerated right knee and hand resulting in neurasthenia; but, at the hearing, he based his claim upon neurasthenia alone. The first doctor whom he called, a

Mr. Rowbottom, said in evidence that he did not think that the man was suffering from neurasthenia, and thereupon Mr. Spafford, according to the learned county court judge, intimated that he could not succeed on neurasthenia and asked leave to amend. On this admission it would have been open to the learned county court judge to give an award then and there for the respondents, but he exercised his discretion and granted an amendment, subject to the applicant paying the costs thrown away by the adjournment, such costs being paid into court before the case was reinstated.

The appeal asks that the applicant should be allowed to reinstate his amended case without first bringing into court these costs, but in my view, though I think that the terms ordered by the judge were very onerous and might even result in the workman being unable to avail himself of the leave to amend, we cannot interfere with what after all was entirely a matter of discretion. It is scarcely disputed that the judge could have given judgment for the respondents and refused all leave to amend. The appellant was in mercy, and was only entitled to an amendment on such terms as the learned judge thought fit to impose as to costs. Although the Workmen's Compensation Rules, 1926, r. 8 (iii) provide for particulars of the application, they do not in terms deal with the judge's power to make amendments. This power is derived from rule 29 (i), which provides that, subject to the special provisions of the rules, the procedure in an arbitration shall be the same as the procedure in an action in the county court, and by the County Courts Act, 1888, s. 87, the judge may at all times make such amendments as may be necessary for the purpose of determining the questions in controversy between the parties if duly applied for with or without costs and upon such terms as the judge thinks just. This appeal, therefore, fails and must be dismissed with costs.

The second appeal arises in this way, On Nov. 8, 1935, the interlocutory order was drawn up, and thereafter the costs said by the respondents to have been thrown away were taxed. As to certain of these costs, there is now no dispute ; but with regard to three claims for fees for three doctors, two for eight guineas and one for ten guineas, claimed by the respondents, on the matter being taken before the registrar for taxation only three guineas each were allowed. There was an appeal by the respondents to the judge as to these and other items. The learned judge disallowed the objections to the other items but ordered that the items for the three doctors should be increased by four guineas each and held that seven guineas was a reasonable allowance in each case for the attendance in court of these medical witnesses. It is objected by the appellant that the learned county court judge, in the circumstances, had no right to vary a decision of the registrar merely upon *quantum* and that the rules made under the Workmen's Com-

pensation Act and under the County Courts Act give a discretion to the registrar which cannot be interfered with by the judge on a question of amount when the discretion is otherwise properly exercised.

The point raised is a very important one and goes to the whole practice of taxation in the county court. It is not rendered less important because the learned county court judge tells us that in his long experience he has often so exercised a discretion. In the present case he says that in most, if not all, of his circuits allowances from five to eight guineas have in fact been made on taxation to such medical witnesses for similar attendances. As regards the Workmen's Compensation Rules, the question of costs is dealt with in rules 76 and 78, and in Sched. I (7) of the 1925 Act. By this paragraph the costs of and incidental to the proceedings are in the discretion of the judge, and by sub-para. 2 it is provided that the costs shall be taxed in manner described by the rules, and such taxation may be reviewed by the judge. Turning to rule 76 (1) the costs directed to be paid by one party to another shall be taxed according to such one of the scales of costs applicable to actions in the county court as the judge shall direct, and, generally, the provisions of the County Court Rules, Ord. 53, rr. 7 and 8 are to apply, including allowance and taxation of costs and objections to and reviews of taxation by the registrar. Workmen's Compensation Rules, r. 78 provides that an application to the judge to review any taxation shall be heard and determined upon the evidence brought in before the registrar and that no further evidence he received unless the judge otherwise directs. Further, by rule 76, if there is no direction as to scale of costs by the judge at the trial, the costs are to be taxed according to the scale which would be applicable if the proceedings had been an action in the county court.

It is necessary next to consider County Court Rules, Ord. 53, rr. 7 and 8. By rule 7 an order or decision of the judge or registrar on any of the discretionary items in the scale of costs, or for allowances of any particular costs under any of the County Court Rules, are a special order, and the registrar has no power to allow an item which has been expressly disallowed by the judge, and the order or decision of the registrar as to the allowance or disallowance of any item is subject to review by the judge. In the present case, no special order has been made, and consequently rule 7 does not apply, nor does rule 8 (1), which increases the amounts under rule 8 (2) by special order. But the present case does not fall within that category: it is not disputed that the judge here has purported to make his increase by way of review only.

In my opinion, the judge had no power to disturb the discretion of the registrar expressly given him by the rule on a mere question of *quantum* unless the registrar has purported to exercise that discretion in a way not warranted by law. That such a view had long been held in proceedings

in the High Court cannot be disputed. In *Alsop* v. *Lord Oxford* (1), at page 566, SIR JOHN LEECH, M.R. said :

> Generally speaking, the decision of the master on taxation is final : he is the sole judge of the fact whether the business had been done, and of the proper charge to be made for it ; . . . the court will only interfere where the master acts upon some mistaken principle.

Of cases since the Judicature Act, it is sufficient to cite BUCKLEY, L.J., in *Ogilvie* (2), at page 245, quoted with approval by SWINFEN EADY, L.J. in *Slingsby* v. *A.-G.* (3), at page 239, to the effect that :

> On questions of *quantum* the decision of the taxing master is generally speaking final. It must be a very exceptional case in which the court will even listen to an application to review his decision.

In *Slingsby's* case (3) SWINFEN EADY, L.J. proceeds :

> The decision of the taxing master is not absolutely final even on a question of *quantum*. For instance, a large sum might be allowed, but from the very fact of the amount the court might see that the master, in arriving at so large a sum, must have acted on a wrong principle or have taken something into consideration which he ought not to have done.

In the present case, the reasons given by the learned judge cannot be based upon any such assumption, nor is it seriously argued that the registrar improperly exercised his discretion. That the Judicature Act made no difference to the practice in this matter is shown by the fact that in *Slingsby's* case (3) the court cited with approval the case of *Re Catlin* (4) in which SIR JOHN ROMILLY, M.R., at page 509, says :

> It is admitted, on both sides, that this court can only be called upon to determine on the propriety of allowing or disallowing items which involve some principle, and not where a question only of *quantum* arises.

A distinction was sought to be made in the present case between the High Court Rules and the County Court Rules in that it was argued that in a High Court case problems of increases of allowance do not arise. This, however, is not accurate, for under R.S.C. Ord. 65, r. 27 (29) the taxing masters still have in special cases an unfettered discretion. (See *Re Ermen* (5) discussing this matter.) Such increases, like other determinations in the certificate of the taxing master under R.S.C. Ord. 65, r. 27 (41), may be reviewed by the judge, but only on the principles above stated.

It follows, therefore, that the principles to be applied in the High Court and in the county court on this matter are similar, and those principles applied to the present case prevented the county court judge from increasing the fees for these doctors as subjects for taxation taxed by the registrar. This appeal, therefore, must be allowed with costs

here and before the judge, and the increases ordered by the judge must be deducted from the costs to be paid by the applicant as a condition of his proceeding with the arbitration.

Greene, L.J.: I agree with the judgment just delivered in both these appeals, and with regard to the first of them I do not desire to add anything to what my Lord has said.

The second appeal raises a question of importance with regard to the principles on which the power of a county court judge to review decisions of the registrar as taxing officer ought to be exercised. The rule that the decision of a taxing officer on questions of *quantum* ought not to be overruled by the judge on a review of taxation has long been established. This rule, in my opinion, applies generally to taxation in the county court as it applies to taxation in the High Court, and it is only in exceptional circumstances (which do not exist in the present case) that a decision of the taxing officer on a question of *quantum* should be overruled. The relevant rule in the present case is County Court Rules, Ord. 53, r. 8 (2). Under this rule the registrar is given a discretion to increase by a reasonable amount the amounts allowable under any item in the scales. This discretion is to be exercised by the registrar in accordance with County Court Rules, Ord. 53, r 23, and his discretion is subject to review by the judge. County Court Rules, Ord. 53, r. 8 (2) also provides that the increase may be allowed by special order of the judge, but in the present case no such order was made, all matters being left to taxation in the usual way. County Court Rules, Ord. 53, r. 23 provides that in this case, as in the case of all discretionary fees and allowances, the registrar in the exercise of his discretion, shall take into account the various matters there specified. The general provisions as to taxation and review of taxation are to be found in the County Court Rules, Ord. 53, r. 1, which provides that all costs shall be taxed by the registrar according to the scales in Part 4 of the Appendix subject to the review of such taxation by the judge, and in County Court Rules, Ord. 53, r. 49, which provides generally for review of taxation by the judge. County Court Rules, Ord. 53, r. 49 (1) is similar in its terms to R.S.C. Ord. 65, r. 27 (41), under which it has always been held, that apart from exceptional cases, the discretion of the taxing officer on questions of *quantum* should not be interefered with.

During the course of the argument it at one time appeared to me that there was something to be said for the view that, as County Coure Rules, Ord. 53, r. 8 (2) is essentially a rule dealing with *quantum* and the decision of the registrar is, by the rule itself, expressly made subject to review by the judge, the rule must be taken to contemplate that this exercise of discretion on questions of *quantum* should be subject to review by the judge notwithstanding the general principle to which I have referred. In support of this argument it is to be observed that,

where individual rules of the Supreme Court make provision for increase in scale allowance at the discretion of the taxing officer, there is no express provision that his decision is to be subject to review by the judge, the matter being governed by the general provisions as to review which are contained in R.S.C. Ord. 65, r. 27 (4). As an example I may refer to R.S.C. Ord. 65, r. 27 (3). On consideration I have come to the conclusion that this argument cannot be accepted. At the date when the County Court Rules were framed, the principles upon which decisions of a taxing officer can be reviewed by the judge were well established. When those rules give a power to review they must, I think, be construed in relation to those principles; and the mere fact that County Court Rules, Ord. 53, r. 8 (2) expressly says that the decision of the registrar in increasing a scale allowance is to be subject to review by the judge is in my opinion insufficient to justify us in construing that provision as contemplating a review on any principle other than the established one. It is to be observed that County Court Rules, Ord. 53, r. 8 (2) expressly gives the registrar a discretion, while r. 23 (which corresponds to R.S.C. Ord. 65, r. 27 (38)) lays down the principles upon which that discretion is to be exercised. In any case which the registrar, in making a discretionary increase in the scale allowance, acts on a wrong principle or takes into account matters which he ought not to take into account or omits to take into account matters which he ought to take into account, his decision may be reviewed by the judge. Where this is not the case and he has properly exercised his discretion, the judge ought not to overrule his decision on a mere question of *quantum* in the absence of some exceptional circumstances. In the present case it is not suggested that the registrar erred in respect of any of these matters, the only criticism of his decision being that it was insufficient in point of amount. I agree that this appeal should be allowed.

SCOTT, L.J.: This appeal raises a question of public importance, because it affects the policy of our legislation about the costs of litigation in the county courts, or at any rate the statutory methods by which those costs are kept low. It raises directly the question whether the discretion of the registrar—the statutory taxing master—is final as in the High Court, and indirectly touches the fixed scale system which, under the Act of 1888, is the basis of all county court taxation. The question turns on the true interpretation of the language of the relevant statutes and rules.

The workman had on Nov. 6, 1935, been orderd by the judge of the Altrincham County Court to pay the employers' costs of certain proceedings—what they were does not matter. The employers' bill was in due course taxed by the registrar, scale "B" being the scale applicable. He disallowed or reduced various items, but only three

items are material to this appeal. They were fees for medical witnesses who had given evidence for the employers: two surgeons and a neurologist. In the bill brought in for taxation the items stood as follows:—

Dr. Kerr—attending court	£8	8	0
Mr. Burt Hamilton—qualifying ..	3	3	0
attending court	10	10	0
Dr. Gardon—attending court	8	8	0

The registrar reduced the items in each case to an inclusive fee of three guineas. Objections were lodged on the ground that "the sums allowed were not reasonable," but he overruled these objections on grounds stated in his written answers:

It will be observed that the objections are limited to a statement that the sums allowed are "not reasonable," which, being a positive statement, unsupported by reasons, on a matter within the discretion of the taxing official, it will perhaps be deemed sufficient to say that my discretion in this regard has been to the best of my ability exercised fairly and reasonably and, it is submitted, without the infringement of any principle or omission to give due consideration to all relevant facts.

The limits of the scale costs are stated on p. 1094 of the County Court Practice, 1936. On scale "B" a qualifying fee, if allowed (i.e., by the judge, normally at the hearing), is one to three guineas, an attendance *per diem* one to two guineas. The employers then applied to the learned judge to review the registrar's decisions, submitting in each case that three guineas was "not a reasonable allowance," and on Jan. 8, 1936, the judge increased each of the three items to seven guineas, on the ground that in his discretion he thought three guineas was too little. Before us it was submitted for the workman that the learned judge had no discretionary power to interfere with the discretion of the registrar; that there were no grounds for any suggestion that the registrar had applied any wrong principle, and in short, that the judge had had no jurisdiction to make any alteration whatever, or to substitute his discretion for the registrar's.

Our decision must rest upon our interpretation of the actual language used in the statutes and rules applicable, and the crucial provisions are, in fact, those applicable to county court costs in general. Those provisions, however, were framed in the nineteenth century in the light of the practice and principles followed in the superior courts, and it is therefore essential to note what was the language of the provisions affecting those courts when the County Courts Acts and rules were framed, on order to see if there is any—and what—significant difference between the two. For this purpose it is fortunately not necessary to make any detailed historical research, as there is no suggestion that the relevant provisions of R.S.C. Ord. 65 (which contains all that is material)

effected any change in regard to review by the judge of a taxation by the taxing master; nor was it suggested to us that the County Courts Act, 1888 and the rules made thereunder effected any material change in regard to county courts. It is sufficient, therefore, to compare R.S.C. Ord. 65 with the relevant provisions as to county courts.

This comparison must begin with a consideration of the High Court position. R.S.C. Ord. 65, r. 27 (41) is the dominant provision, and the relevant parts are as follows:—

> Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may apply to the judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as the judge may think just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.

It might be thought that this language gave the judge an unfettered discretion to reconsider anything whatever decided by the taxing master, but this would be a wholly wrong interpretation, as is clear from the following decided cases. In *Hill* v. *Peel* (6), in the judgment of the court, consisting of BOVILL, C.J., and WILLES and BRETT, JJ., upon three election petitions, the principles on and the extent to which the High Court will interfere with the discretion of one of its taxing masters were laid down in general but very definite terms, as follows, at pages 180, 181:

> A very wide discretion must necessarily be left to the taxing officer, which must be exercised by him after a careful consideration of the particular circumstances of each case; and where, after properly considering the matter, the master has arrived at a decision, it lies upon those who impeach his decision to satisfy the court that he is wrong. Where a principle is involved, the court will always entertain the question, and, if necessary, give directions to the master; but where it is a question of whether the master has exercised his discretion properly, or it is only a question as to the amount to be allowed, the court is generally unwilling to interfere with the judgment of its officer, whose peculiar province it is to investigate and to judge of such matters, unless there are very strong grounds to show that the officer is wrong in the judgment which he has formed.

On a particular aspect of one of the cases then before the court WILLES, J. dissented, but his dissent in no way affected the enunciation of the principles contained in the above extract from the judgment of the court as a whole.

In the case of *In the Estate of Ogilvie* (2) the Court of Appeal laid down the general principle of the discretion of the taxing master in the High Court in similar language and perhaps even more strongly, treating the rule as long settled. COZENS-HARDY, M.R. adopted the statements of the principle made by two of his predecessors, SIR JOHN LEECH in

Alsop v. *Lord Oxford* (1), and 20 years later by Sir John Romilly in the case of *Re Catlin* (4), in which the latter has said, at page 509 :

> It is admitted, on both sides, that this court can only be called upon to determine on the propriety of allowing or disallowing items which involve some principle, and not where a question only of *quantum* arises.

Buckley, L.J. was equally definite :

> On questions of *quantum* the decision of the taxing master is generally speaking final. It must be a very exceptional case in which the court will even listen to an application to review his decision. In questions of *quantum* the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed ; the court will not interfere unless the taxing master is shown to have gone wholly wrong. If a question of principle is involved it is different ; on a mere question of *quantum*, in the absence of particular circumstances, the decision of the taxing master is conclusive. I think that the learned judge ought not to have interfered.

Kennedy, L.J. said :

> I am of the same opinion. I only desire to say that, speaking from my own recollection, what has been stated to be the practice in the Chancery Division is the practice in the King's Bench Division, and I see nothing in any of the Probate Rules to which we have been referred to give the least ground for holding that there is any difference in the practice of the Probate Division which would justify us in upholding the decision of the learned judge.

It is next necessary to consider the language of the statutes and rules applicable to the taxation of costs under the Workmen's Compensation Act, 1925 (there being no suggestion of any material difference between the original Act of 1897 and later legislation on the subject of workmen's compensation). The essence of the system is that the taxation of costs is entrusted to the registrar of the county court in all cases like the present where the county court judge acts as the arbitrator under the Act ; see the 1925 Act, Sched. I (7) (ii) :

> The costs, whether before a committee or an arbitrator or in the county court, shall not exceed the limit prescribed by rules of court, and shall be taxed in manner prescribed by those rules and such taxation may be reviewed by the judge of the county court.

Sect. 27 of the Act confers power on the Rule-making Committee, appointed under the County Courts Acts of 1888 (sect. 164) and 1919 (sect. 24), to make rules having "full effect" when allowed by the Lord Chancellor, for the purpose, *inter alia*, of "generally carrying into effect this Act so far as it affects the county court and proceedings in the county court." The Workmen's Compensation Rules, r. 76 (1) made under the above powers in effect applies to both the county court scales of costs and the county courts statutory provisions and rules as

to the taxation of costs and as to objections to and review by the registrar. Para. (4) provides :

> Where proceedings are taken for which no provision is made by these rules or by the scales of costs, reasonable costs may be allowed in respect of such proceedings by the registrar, subject to review by the judge, or by special order of the judge, not exceeding those which may under the scales be allowed in respect of proceedings of a like nature.

Rule 78 contains provisions for review by the judge of a taxation by the registrar, para. (2) forbidding fresh evidence unless the judge otherwise directs, and para. (4) directing an entry of the result of the review on the register.

It is to the statutory enactments and rules of the county courts that we must turn to fill in the rest of the picture. It is a distinguishing feature of the law of costs in the county court that *quantum* is not left at large dependent on the discretion of the taxing officer, as in the High Court, but is within certain limits fixed by quantitative scales and items. In the High Court taxing practice of old standing had in effect produced administrative results which were not dissimilar in effect. It is, however, noteworthy that, in dealing with the important topic of costs in county court legislation, Parliament itself decided that the scales of costs should be expressly regulated by the rules which it directed the Rule Committee to make (see sect. 164 of the Act of 1888), no doubt with a view to making certain that the scale of costs should be kept reasonably low. The same section delegated very wide rule-making powers to the Rule Committee, subject to allowance or alteration by the Lord Chancellor and the concurrence of the High Court Rule Committee. Where not otherwise provided for in the County Court Rules, the High Court rules were to apply. The County Court Rules, Ord. 53, is the costs order, and it is on the true interpretation of that order that this appeal depends. It therefore calls for careful scrutiny. Does it follow the analogy of the High Court relationship between the court and its taxing officer, in which case the discretion of the latter properly exercised is final, or does it substitute a new system in English law under which the judge may overrule the discretionary view of the court's taxing officer and replace it with his own discretion and his own view ? Having regard to the ancient and notorious character of the rule of law followed by the Court of Chancery, and by the common law and other courts which were amalgamated with the High Court : that a " review " by the judge of a taxation by the taxing master was not a discretionary rehearing but wholly or at least substantially an appeal on legal grounds only, I think it is right to approach the problem of interpreting the county court legislation (both primary and delegated) with the assumption that, if it was intended to alter so well known a

principle, that intention would be expressed in clear language; and that conversely, if the language is found to be substantially similar to the language used in the parallel High Court context, it would be wrong to read into it an intention to depart from the long-established construction put upon the High Court language.

In my view there is nothing in either County Courts Act, 1888, s. 118, or in County Court Rules, Ord. 53, to justify any inference of radical change. The language is so similar to the High Court language that I can see no room for doubt; but if there be any, it would in my view be wrong to resolve it in favour of change. There is also the further consideration that such a change would be contrary to the spirit of our county court legislation, which is to encourage speedy and cheap justice —as appears, for instance, in the provision that there shall be no appeal from the judge on fact but only on law—and in the provisions already quoted which, within rather narrow limits, fix the *quantum* of costs items. With these reflections in mind let us turn to sect. 118 of the Act of 1888:

> All costs and charges between party and party shall be taxed by the registrar of the court in which such costs and charges were incurred, but his taxation may be reviewed by the judge on the application of either party, and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force.

It is noteworthy that this section says only "taxed by the registrar," and "his taxation may be reviewed by the judge."

Now let us consider County Court Rules, Ord. 53. Rule 1 says:

> In every action or matter in any court all costs shall be taxed by the registrar of such court according to the scales of costs in Part IV of the Appendix, subject to the review of such taxation by the judge.

Note the phrase "subject to the review of such taxation by the judge." I will revert to it later. The scales and items appear in Part IV of the Appendix to the Rules (see County Courts Practice (1936), page 1067). Rule 7 deals with discretionary items and provides that "the order or decision of the registrar as to the allowance or disallowance of any item shall be subject to review by the judge." Rule 8 (2) provides:

> Where costs are taxed under column B or column C, the amounts allowable under any item in the scales (including the items relating to plans, drawings, charts or models, and the allowances to expert and scientific witnesses) may, regard being had to the length, difficulty or importance of the case, be increased by a reasonable amount at the discretion of the registrar (to be exercised in accordance with rule 23 of this order), subject to review by the judge, or by special order of the judge.

Rule 8 (3) contains similar provisions as to counsel's fees, brief, etc.

Rule 20 forbids any allowance for costs not sanctioned by the scale (with certain exceptions). Rule 21 says :

> When under the scales or rules a discretion as to the allowances to be made is vested in registrars, they are required to exercise such discretion with care and discrimination, and strictly in accordance with the particular directions set forth in the scales and rules.

Rule 23 deals at length with the discretion of the registrar and is therefore specially important :

> All fees or allowances which are discretionary shall, unless otherwise provided, be allowed at the discretion of the registrar on taxation, who, in the exercise of such discretion, shall take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the action or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances.

Rule 37 permits allowances to witnesses to be " increased or decreased " (i.e., from the scale) " at the discretion of the registrar, subject to review by the judge, or by special order of the judge . . . ." Rule 42 lays down :

> Seamen necessarily detained on shore for the purpose of an action or matter shall be allowed such remuneration as the judge may order, or, in the absence of an order, as the registrar may think reasonable compensation for their loss of time.

Rule 43 relates to expert witnesses, but is concerned with the conferring of the right to a fee for qualifying or attendance and not *quantum* (which is covered by rule 23). Rules 47 and 48 provide for a review by the registrar of his own taxation on objections lodged. Rule 49 fills in the details of sect. 118 of the Act. It does not contain anything which appears to me to throw light on the question whether we are to interpret the word " review " in sect. 118 in a sense different to the High Court sense.

I have now exhausted all the material, having been through the text of the instruments we have to construe. There are certain rules which seem at first sight verbally consistent with the judge having the right to correct as he thinks fit in exercise of a complete though judicial discretion ; but it is noteworthy that nowhere is there any departure from the word " review." He is not given, like the registrar, power even to " reconsider " (see rule 48 for the use of this word as applied to the registrar). The bare wording of sect. 118 thus remains, and we have no need to discuss any question of the rules going beyond the limitation of the Act. On the whole survey I come to the conclusion that a county court judge has been given no wider discretion than a High Court judge on a review of the taxation performed by the taxing officer of the court, in whom the discretion is vested. I have the additional satisfaction of feeling that this conclusion conforms to the policy of Parliament in its

attitude towards the costs of justice in the county courts. The appeal must be allowed.

First appeal dismissed, second appeal allowed with costs.

Solicitors: *Rochester Pusey & Co.*, agents for *T. A. Needham & Son*, Manchester (for the appellants); *William Charles Crocker*, agents for *Wood, Lord & Co.*, Manchester (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

RENOUF *v.* ATTORNEY-GENERAL FOR JERSEY.

[Privy Council (Viscount Hailsham, L.C., Lord Thankerton, Lord Maugham, Sir George Lowndes, Sir Sidney Rowlatt), **April 6, 1936.**]

Appeal to Privy Council—Criminal matter—Right of appeal—Appeal by special leave—Grounds for allowing appeal.

The appellant was convicted in the Royal Court of Jersey of criminal negligence in driving a motor car. He was sentenced to twelve months imprisonment with hard labour and his licence was withdrawn. He appealed to the Privy Council:—

Held: (i) there is no "right of appeal" in the proper sense of the term in a criminal matter from the Royal Court of Jersey to the Privy Council.

(ii) the prerogative right of His Majesty to allow an appeal by special leave has not been taken away by statute or otherwise in such a case and such special leave may be granted.

(iii) upon such leave being given mere misdirection or irregularity is not enough to support such an appeal, but there must be a violation of legal principles resulting in grave and substantial injustice.

[**Editorial Note.** The question of the right of appeal from the island will perhaps not be of particular interest itself outside the Channel Islands, but the latter part of the judgment will be of interest in all those parts of the Empire where the administration of criminal justice "rests almost entirely on modern practice and tends more and more to imitate English models."

As to Appeals from Channel Islands, see HALSBURY, Hailsham Edn., Vol. 11, p. 227, para 441, and for Cases, see DIGEST, Vol. 17, pp. 489-491, Nos. 525-564.]

Cases referred to:

(1) *Nadan* v. *R.*, [1926] A.C. 482; Digest Supp.
(2) *British Coal Corpn.* v. *R.*, [1935] A.C. 500; Digest Supp.
(3) *Re Ames* (1841), 3 Moo. P.C.C. 409; 17 Digest 488, *525.*
(4) *Esnouf* v. *A.-G. for Jersey* (1883), 8 App. Cas. 304; 17 Digest 489, *531.*
(5) *R.* v. *Bateman* (1925), 19 Cr. App. Rep. 8; Digest Supp.
(6) *Ibrahim* v. *R.*, [1914] A.C. 599; 17 Digest 491, *560.*
(7) *Ex p. Macrea*, [1893] A.C. 346; 17 Digest 490, *551.*
(8) *R.* v. *Bertrand* (1867), L.R. 1 P.C. 520; 17 Digest 477, *402.*
(9) *Re Dillet* (1887), 12 App. Cas. 459; 17 Digest 490, *542.*
(10) *Lawrence* v. *R.*, [1933] A.C. 699; Digest Supp.

APPEAL from the Royal Court of Jersey. The facts and circumstances of the appeal are fully stated in the judgment.

Richard O'Sullivan, K.C., and *Theobald Mathew* for the appellant.

The Attorney-General (*Sir Thomas Inskip, K.C.*), *Kenelm Preedy*, and *J. P. Ashworth*, for the respondent.

The judgment of their Lordships was delivered by LORD MAUGHAM.

LORD MAUGHAM: This is an appeal by special leave from a judgment and conviction of the Royal Court of the Island of Jersey dated Nov. 8, 1934. The trial of the appellant was by way of an indictment presented by and on behalf of the respondent, the Attorney-General for Jersey, and took place on Nov. 8, 1934, before the Full Court consisting of the bailiff and eight jurats with a jury of twenty-four. The indictment charged the appellant with having on Aug. 19, 1934, driven his motor car at a dangerous speed and to the danger of the public and with having by his criminal imprudence, carelessness, or negligence having inflicted injuries which caused death. The appellant pleaded not guilty, but was found guilty by the unanimous verdict of the jury and was sentenced to twelve months' imprisonment with hard labour, and his driving licence was withdrawn. Special leave to appeal was given by Order in Council dated Dec. 20, 1934, but without prejudice to the right of the respondent to argue that the appeal is incompetent. The contention of the respondent is that the decision of the Royal Court of Jersey in a criminal case is final and is not open to question or appeal even with special leave of His Majesty in Council.

There are thus two entirely distinct questions for consideration: first, whether special leave to appeal from the verdict and sentence could properly be given in this or any other criminal case from Jersey, and, secondly, whether, if the answer is in the affirmative, the present appeal from verdict and sentence is within the class of exceptional circumstances in which their Lordships could advise His Majesty to intervene.

It seems to their Lordships beyond doubt that there is no right of appeal from the decision of the Royal Court in a criminal case to His Majesty in Council, using the term "right of appeal" in its proper sense. It will be remembered that (subject to certain limitations or exceptions not material to the present case) there was no right of appeal in a criminal matter either in England or in any of the dominions of the Crown until a recent date (in England the date of the Criminal Appeal Act, 1907). The verdict of the jury was for centuries considered to be conclusive. It may be added that the Island of Jersey is not a colony or to use the old phrase "a plantation." It is part or parcel of the ancient Duchy of Normandy which came into the possession of William, Duke of Normandy, in A.D. 933 and remained attached to the English Crown when Philip II of France conquered the rest of Normandy from King

John. It has its own constitution and is governed by its own laws; and, apart from enactment, it would be strange to find that there was a right of appeal properly so called in criminal matters to the King in Council. In fact as will be seen there is no trace in any legislation or in any authoritative work of any such right of appeal. The evidence is uniformly against the existence of such a right. The question of the power of the King to admit an appeal in such a case as an act of grace gives rise to very different considerations. The discretion of the King in Council to grant special leave to appeal has been often described, not inconveniently, as the prerogative right; and there is a whole body of authority tending to show that this prerogative right can only be taken away by the express words or the necessary intendment of a statute or other equivalent act of state. A short account of the way in which the different methods of reaching the Sovereign as the fountain of justice, namely by appeal as of right and by appeal after special leave obtained, have grown up, will be found in the cases of *Nadan* v. *The King* (1), at page 491, and *British Coal Corporation* v. *The King* (2), at page 511. The judgment of the Board delivered by Viscount Cave, L.C. in the former of these cases contains a reference to most of the previous decisions of the Board in which the question of the prerogative right of the Crown to grant special leave has been considered and it is unnecessary to repeat his observations here. In dealing with the case of a court of great antiquity such as the Royal Court of Jersey, the question must be whether in any of the constitutions, charters, Orders in Council, or other acts of state there is any ground for holding that the prerogative right has been taken away, bearing in mind that precise words, or the necessary effect of them, alone can result in such a conclusion.

[Their Lordships dealt in detail with the relevant historical documents.]

Royal Commissioners were appointed in 1846 to enquire into the criminal laws then in force in the Channel Islands and into the constitutions and powers of the tribunals and authorities charged with the execution of such laws; and in the course of their commission they made enquiries as to the right of appeal in criminal cases. In the answers made in 1847 it was stated by various jurats that the verdict of the Grand Jury was final and that no further appeal was allowed in any questions of a purely criminal nature. Several of the persons answering the questions stated that the court in passing sentence always reserved a right to the party convicted of applying to His Majesty for pardon. Nothing however was said about the right of the Crown in Council to give special leave to appeal. The valuable report of the Commissions on the criminal law of Jersey made in 1847 does not refer to the prerogative right of the Crown.

The matter had, however, come before His Majesty in Council a few years previously in the case of *Re Abraham Ames and others* (3) on the

petition of Her Majesty's Attorney-General for Jersey. Ames and others, masters of fishing smacks in the Island of Jersey, had been brought before the Royal Court of Jersey and sentenced to pay a fine of 300 livres and costs. There was an appeal from this sentence to the Full Court which affirmed the decision of the inferior court. From this decision Ames on behalf of himself and others of the defendants prayed leave to appeal to Her Majesty, but the Royal Court refused to grant such appeal. Thereupon Ames and others presented a petition in the nature of a "doléance" to Her Majesty praying for leave to appeal and that all proceedings consequent upon the above sentence should be stayed in the meantime. Leave to appeal was given by Order in Council pursuant to the advice of their Lordships. In the year 1841 the Attorney-General of Jersey presented a petition to the Queen in Council complaining that the Order granting leave to appeal was obtained by surprise and praying that it might be rescinded. The Attorney-General argued that the law of the Island allowed no appeal from the Royal Court of Jersey in criminal cases, and he further argued that the court could not entertain the matter as a "doléance" because there was no complaint against the judge. In delivering the judgment of the Board PARKE, B., stated that their Lordships were of opinion that the application to dismiss the appeal must be granted and he added this at page 413 :

> We are disposed to say that we ought not to have recommended Her Majesty to have allowed the appeal, but we are not disposed to say that we have not the power so to have done, as Her Majesty is the head of justice, and we are sitting here, not merely as a judicial body, but as Privy Councillors, and the matter of the former petition was referred to us generally. But we are fully aware of the difficulties which we should entail on ourselves if we were to grant appeals in matters of criminal prosecutions ; and under the circumstances of this case, we think that the Order of June 18, 1838, ought not to have been granted, and must be rescinded.

Similar language was used by LORD BLACKBURN in delivering the judgment of the Board in the case of *Esnouf* v. *A.-G. for Jersey* (4). It is reasonably clear that the opinion of the Board in both cases was that in a proper case Her Majesty would be entitled to grant special leave to appeal. On consideration of all the various matters to which their Lordships have been referred the conclusion must be that there is no Order in Council, charter, or other instrument of authority from which it can be inferred that the King's prerogative to allow an appeal from the Royal Court of Jersey, if so advised, has been taken away in criminal matters. The cases in which the Board ought to advise His Majesty to exercise his prerogative in a criminal case are of a rare and exceptional character, but that the prerogative still exists is in the opinion of their Lordships beyond doubt.

[Their Lordships reviewed the facts.]

The appellant's ground for appeal is based upon the alleged defects

of this summing up. It is contended that the bailiff left the jury under the impression, amongst other things, not only that the question of the contributory negligence of the deceased was altogether immaterial, that the appellant must be convicted unless the evidence established that he had taken all the steps that a skilful and sensible driver could have taken, and that he could only be acquitted if the jury were satisfied that the death of the deceased was due to a pure accident or misadventure, such an accident as no reasonably skilful driver could have avoided. Their Lordships are far from saying that the summing up in question is not open to criticism, and they are not to be taken as expressing any opinion as to the course which would or might be taken in a general Court of Criminal Appeal if such a summing up were before them. They observe, however, the Attorney-General for Jersey began by stating the law (assuming that the law of Jersey in this case is similar to that of England) in unobjectionable terms and that his statement was adopted by the bailiff. Indeed, phrases are used which are taken from an English text-book (Law of Collisions on Land, by Roberts & Gibb, 2nd Edn., pages 189 to 195). The bailiff himself stated plainly that the appellant was accused by the Crown of having killed the man, owing to the fact that he drove at a dangerous rate and to the danger of the public, and "by his imprudence or lack of skill criminally killed him." It is doubtless unfortunate that in the latter part of his address the bailiff left out (to use the language of Lord Hewart, C.J. in *Bateman's* case (5)) "some of the adjectives which have always been used in explaining criminal negligence" to a jury, and that some sentences taken alone are consistent with the view that a hostile verdict might be given on the ground of mere carelessness, negligence or lack of skill such as would justify a verdict in a civil case. On the other hand their Lordships have noted that the Attorney-General had stated the law as being that any person causing the death of another by gross negligence in the performance of a legal duty owed to that other, is guilty at least of manslaughter, and that the speech of the advocate for the defence referred repeatedly and without being contradicted to the fact that there was no homicide unless the defendant had been guilty of "negligence tantamount to criminal negligence."

Moreover, there are other difficulties which interpose themselves. In the first place it is by no means clear to their Lordships that the law of Jersey on the subject of manslaughter as the result of a collision on land is precisely the same as that which exists in this country. The criminal law of the Island of Jersey is and has long been in a remarkably fluid state. Historically it should begin with the great repository of early Norman law the Grand Coutumier of Normandy; but unfortunately this work is very detective in relation to crime, for although some chapters treat of criminal suits and others make mention of crimes and

misdemeanours, the punishments are not specified in either and no corporal punishment short of death or loss of limb is anywhere mentioned. There appear to be no Orders of His Majesty in Council or ordinances of the States sanctioned by royal authority which throw light upon the general question of crime, except in the cases of some particular crimes which their Lordships are not here concerned with. In the year 1689 the Attorney-General for the Island made a report to the King's Privy Council in which he stated that according to the laws of the Island there was no distinction made betwixt wilful murder, manslaughter, and "chance medley." This report was approved by His Majesty in Council and (after discharging a certain prisoner from his imprisonment) His Majesty was pleased to order that if for the future it should appear by good evidence to the Royal Court in Jersey upon the trials of any persons for murder, manslaughter, and chance medley, that there was no premeditated malice, and that the parties were fit objects of mercy, the judges of the said court should upon such occasions suspend all further proceedings against the criminal until His Majesty was made acquainted with the state of their respective cases and His Royal pleasure should be signified thereupon, and the bailiff and jurats of the Island of Jersey and all others concerned were to take notice and to cause the order to be registered in the Royal Court of the Island. It may be mentioned here that Orders in Council are registered by the Royal Court and are not binding as law until such registration has taken place.

Apart from the Code of Laws of 1771 to which reference must again be made, there seems to be nothing in the nature of a written law of Jersey dealing with crimes. By the Order of Mar. 28, 1771, approving the code it was declared that "all other political and written laws heretofore made in the said Island and not included in the said Code and not having had the Royal Assent and confirmation shall be from henceforward of no force and validity." Some doubt has been expressed as to the meaning to be attached to these words, but to their Lordships it seems clear that the clause is dealing only with written laws and is not in any way affecting customary laws. The Code contains, however, only one criminal enactment, that is a provision as to persons who are accessories of criminals and to prison breakers and persons aiding them. It appears from the first (Jersey) report of the Royal Commissioners appointed in 1846 (above referred to) for enquiring into the criminal laws of the Channel Islands, that there was not in any Act, Order in Council, or even in any work of authority published in Jersey, any specific definition of crimes or their punishments. So far indeed as specific enactment is concerned the law in reference to manslaughter would seem to be in the same state as it was in the year 1689. In fact, however, there has been a long established practice in Jersey which has

apparently permitted the Royal Court to introduce alterations in regard to the criminal law and its punishment and particularly in the direction of mitigating the severity of the ancient Norman practice. The law of Jersey was indeed during the eighteenth century considerably more humane than that of England. For example, whilst hanging was the necessary punishment for sheep stealing in England, in Jersey the delinquent was only "exposed to be whipt," and whilst simple theft was a capital crime in England, in Jersey the criminal forfeited his life only on conviction of a third offence. In modern times, however, it has been usual to refer to English legal works and precedents as authorities, and the Royal Court has in many cases regarded the English law as a guide in laying down the modern law of Jersey. According to the Commissioners who made the report of 1847, this *de facto* alteration of the criminal law is due to two circumstances. In the first place the Royal Court until the Order in Council of 1771 possessed the power of legislation, and while that legislative power existed it is easily to be understood that the members of the court would not regard themselves as bound to adhere to the previous law in a particular case; more particularly when the ancient law was of an exceedingly harsh character and had ceased to accord with the general feelings of the inhabitants of the Island. This laxity in the application of the existing law seems to have continued after the Royal Court had ceased to possess its power of legislation. On the other hand the peculiar and the popular nature of the ancient tribunal called the Royal Court has contributed to the system of treating the law as not being of a rigid character. The jurats are chosen by a system of election by a widely extended suffrage, the persons selected having seldom received any legal education. They are tempted to act upon their individual notions of justice. Criminal law in Jersey thus rests almost entirely on the modern practice of the Royal Court and this tends more and more to imitate English models. It may not be improper to add that a similar practice has been adopted in a number of British Dominions, including those where English law does not prevail, without in many cases any statutory authority for such a course.

There are thus difficulties in laying down for Jersey the same strict rules as to a summing up to a jury which have been formulated in this country in their definite form since the institution of a Court of Criminal Appeal. There are in the Full Court not less than eight judges in all, the bailiff or his deputy and not less than seven jurats, all of whom have an equal right to address the jury; and the fact that that right might be exercised by several of them in terms which might be by no means identical, makes the criticism of the observations of the bailiff and jurats a matter of some delicacy. The peculiar and special constitution of the Royal Court and the curiously fluid state of the criminal law afford

reasons for hesitating to interfere with a verdict on the ground of a summing up alleged to be objectionable. It may be useful to repeat that the Board has always treated applications for leave to appeal and the hearing of criminal appeals so admitted as being upon the same footing. As LORD SUMNER, giving the judgment of the Board in *Ibrahim* v. *R.* (6) at page 615 remarked :

> The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself ; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it.

He added, what is material in the present case :

> Misdirection, as such, even irregularity as such, will not suffice : *ex parte Macrea* (7). There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future. (*R.* v. *Bertrand* (8).)

It is unnecessary to repeat the well-known observations of LORD WATSON in relation to a review of criminal proceedings before the Privy Council in the case of *Re Dillet* (9). The appellant relied upon some observations in the judgment of the Board in the case of *Lawrence* v. *The King* (10), distinguished and explained, at page 707, as involving that the omission of the judge to direct the jury as to the onus of proof and to tell them that the accused is entitled to the benefit of any reasonable doubt is, of itself, such a miscarriage of justice as will lead this Board to set aside the conviction. But the passage relied on clearly does not lay down any such narrow doctrine. It recognises that the question is whether the jury had present to their minds the governing principle of our law as to onus of proof, and that the jury may have this present in their minds otherwise than by any direction of the Judge. The particular circumstances of that case, the various groups of charges and the way in which they were dealt with in the course of the trial, the form of the directions by the judge and the form of the verdict made it reasonably certain that the jury did not have the principle as to onus of proof clearly before their minds, and it was held by the Board that the appellant had sufficiently established the miscarriage of justice. The decision is not to be regarded as modifying the burden laid on an appellant before this Board by the ruling in *Dillet's* case (9). In the case of misdirection, as in any other case of an alleged failure in the proper trial of a criminal case, the Board give advice to His Majesty to intervene only if there is shown to be such a violation of the principles of justice that grave and substantial injustice has been done. The Board has repeatedly declined to act as a general Court of Appeal ; and even if English law were shown to be applicable in all its details a failure to state the law in the summing up to the jury in the terms carefully considered and expounded in *Bateman's* case (5) at page 13, or to insist

more clearly on the onus of proof lying upon the prosecution would not in the opinion of their Lordships necessarily establish that there had been a serious miscarriage of justice. Apart from the circumstance that a summing up in the dominions or abroad is often imperfectly reported (if it is reported at all), admissions by the prosecuting counsel or other incidents in the course of the trial may well have sufficiently brought home to the minds of a jury some factor in the case or some principle such as that of the onus of proof which might appear to have been omitted from the summing up of the judge.

On a careful review of the facts in the present case, their Lordships are unable to come to the conclusion that there has been here a violation of legal principles resulting in grave and substantial injustice and they must accordingly humbly advise His Majesty that the appeal be dismissed.

Solicitors; *Charles Russell & Co.* (for the appellant); *The Treasury Solicitor* (for the respondent).

[*Reported by* S. P. Khambatta, Esq., *Barrister-at-Law.*]

BRACIA CZECZOWICZKA *v.* OTTO MARKUS.
BRACIA CZECZOWICZKA *v.* RUDOLF LOY.

[Privy Council (Lord Atkin, Lord Alness, Lord Maugham), **March 5, 1936.**]

Bankruptcy—Bankruptcy notice—Creditor preventing debtor satisfying the debt—Order attaching debt—Onus of proof.

Privy Council—Kenya—Execution—Application of decisions under Debtors Act, 1869.

(i) Before the war, the creditors, a Polish firm, sold to the debtors, an Austrian firm, trading in East Africa, certain cotton goods. The period of credit had not expired on the outbreak of the war; but the debtors being enemy nationals were interned and their African business and property was lost to them. After the war they had a claim against the German Government, but had then become nationals of Czechoslovakia. In 1924 the debtors returned to East Africa, and in the same year the creditors sued them in Vienna and obtained judgment against them. In 1925 the debtors obtained an award from the Mixed German Czechoslovak Arbitral Tribunal against the German State for a large sum and in the same year the creditors obtained an attachment on the "alleged debtors' claim against the Reich Settling Office." In 1932 the creditors obtained judgment for their debt in Kenya and in 1933 they caused the debtors to be served with two bankruptcy notices. The bankruptcy law in Kenya on this point is the same as in England under the Bankruptcy Act, 1914. The debtors sought to have the orders set aside on the ground that by attaching the award in Germany the creditors had prevented them satisfying the judgment:—

Held: the onus was on the debtors to prove affirmatively that the claim in respect of which the bankruptcy notice was issued could and

would have been paid but for some act or omission of the creditor and they had entirely failed to prove any such case.

(ii) It was contended that the attachment orders in Berlin were a form of execution and it was, therefore, improper to issue the bankruptcy notices :—

HELD : the attachment orders were not a form of execution and could not be an execution upon the Kenya decree obtained after the orders. The attachment orders having proved abortive, were not a bar to the issue of the notices.

(iii) In Kenya the procedure in execution follows the Indian Code, and arrest and imprisonment is the normal form of execution. There being some evidence of means and that the debtors had refused to pay some part of the debt when they had the means to pay, a receiving order was made in lieu of committal :—

HELD : the order was rightly made as the English decisions under the Debtors Act, 1869, did not apply.

[**EDITORIAL NOTE.** The facts in this case are complicated by the difficulty of establishing the effect of certain orders in Germany. The objection to the bankruptcy notices was that the creditors had by their action in attaching the debtors' moneys, made it impossible for them to pay the judgment debt. The answer to this contention was two-fold : (*a*) that the debtors had never done what they might to recover the money in Germany and so make the attachment orders effective ; (*b*) that the orders having been abortive they could have no effect upon the debtors' ability to pay the debt. In any event the onus is upon the debtor to show that the action of the creditor has prevented him paying.

FOR THE LAW ON THE MATTER, see HALSBURY, Hailsham Edn., Vol. 2, pp. 37-39, para. 48, and FOR CASES, see DIGEST, Vol. 4, pp. 103, 104. Nos. 925-936.]

Cases referred to :—

(1) *Re Sedgwick, Ex p. McMurdo* (1888), 60 L.J. 9, 4 Digest 104, *929*.
(2) *Re Phillips, Ex p. Phillips* (1888), 5 Morr. 40 ; 4 Digest 86, *778*.

APPEALS from the Court of Appeal for Eastern Africa. The facts and circumstances, which are complex, are fully stated in the judgment.

Cyril Asquith for the appellant.

F. P. M. Schiller, K.C., and *Ronald Smith*, for the respondent.

The judgment of their Lordships was delivered by LORD ATKIN.

LORD ATKIN : These are two consolidated appeals from orders of the Court of Appeal for Eastern Africa which reversed orders of the Supreme Court of Kenya and set aside in the first appeal two bankruptcy notices and in the second appeal a receiving order in bankruptcy made against the respondents. The appellants, whom it will be convenient to call the creditors, are a firm of Polish nationals carrying on business as merchants having their head office in Poland and a branch in Vienna. In 1913 they sold to the respondents, hereinafter called the debtors, who were then Austrian nationals and trading in Kenya as the East African Trading Company, a quantity of cotton piece goods in eight shipments for the price of £4,832 5*s.* 4*d.* At the outbreak of war the term of credit had not yet expired. The debtors were enemy nationals and were interned, Loy in India, Markus being eventually repatriated.

Their business ceased, and their African property was lost to them : but after the war they had a claim against the German Government for damage and destruction of property and also in contract. As the result of the Treaties of Peace they had become nationals of Czechoslovakia. They returned to East Africa in or about 1924 and resumed trading in Kenya under the style of the old East African Trading Company. In 1924 the creditors sued the debtors in Vienna for £4,832 5*s.* 4*d.*, with interest at 6 per cent. up to July 31, 1924, and at 12 per cent. from that date, and on Mar. 23, 1925, obtained judgment against the debtors for the principal sum and interest. On Feb. 13, 1925, the debtors obtained an award from the Mixed German Czechoslovak Arbitral Tribunal against the German State for 66,500 shillings, loss of goods deposited in Custom House at Mwemza, with interest at 5 per cent., and for 34,006 gold marks for the price of merchandise and for a sum of money on deposit with the Treasury. There was a further award of a large sum against the German East African Bank : but that proved of no value and is not relevant to this case. Meanwhile on Jan. 26, 1925, the creditors obtained in Berlin from the Landesgericht, 29th Chamber for Commercial Affairs, an attachment on the "alleged debtors' claim against the Reich Settling Office" to the extent of £4,832 5*s.* 4*d.* This prohibited the Reich Settling Office from making payment to the debtors, and the debtors from disposing of the claim and in particular from "encashing" it. It will be noticed from the dates that at the time this attachment was made the debtors had not obtained their award against the German State, and that the creditors had not obtained their judgment in Vienna against the debtors. It does not appear that they ever obtained judgment in the German courts against the debtors, but possibly there was some system in Germany of extending foreign or at any rate Austrian judgments. But no evidence has been produced as to this. On Dec. 12, 1932, the creditors obtained an attachment order in Berlin which appears to be confined to a claim for 12 per cent. interest on £4,832 5*s.* 4*d.* The attachment is "of the alleged claims of the debtor against the German State represented by the Reich's Finance Minister in respect to compensation regarding the judgment of Feb. 13, 1925, of the German Czechoslovak Mixed Arbitral Tribunal, as well as further claims of debtors against the German State Reich's Fiscus represented by the Reich's Finance Minister regarding compensation of war losses of the debtors' properties in the African colonies." This order has the words "Simultaneously these mentioned claims are being transferred in favour of the creditors for the purpose of collection." There has been some controversy as to the legal effect of these German attachments, but this will be discussed later. On Nov. 16, 1929, the creditors commenced an action in Kenya against the debtors for the price of the goods with interest, together with a claim

for money lent in Oct. 1917. They claimed alternatively on the Viennese judgment. In September, 1932, they obtained a decree in the Supreme Court of Kenya for the amount claimed, which decree was varied as to amount by an order of the Court of Appeal for Eastern Africa dated June 20, 1933, under which the creditors obtained a final decree for 210,501 shillings.

On Aug. 21, 1933, the creditors caused the debtors to be served with two bankruptcy notices in pursuance of the Kenya Bankruptcy Ordinance, 1930 s. 3 (1) (*g*), which is in similar terms to the English provision. An objection to the form of bankruptcy notices was suggested in the respondents' case. It was not taken in the courts in East Africa, and was in the circumstances very properly not pressed by respondents' counsel on this appeal. Their Lordships therefore pronounce no opinion about it. The debtors, however, did apply to set aside the bankruptcy notices on the ground that the creditors by their action in obtaining the orders in Germany above referred to had prevented the debtors from complying with the notices. Affidavits were filed on both sides and on Oct. 26, 1933, LUCIE SMITH, J., refused to set aside the notices. On appeal by the debtors to the Court of Appeal for Eastern Africa on Nov. 6, 1933, that Court allowed the appeal. Applying the principle stated by LORD ESHER in *Re Sedgwick* (1), ABRAHAM, J., said that the question was, had the respondent done all he reasonably could to obtain from the German Government payment of the sum found due by the Mixed Arbitral Tribunal, which by virtue of the order of Dec. 12, 1932, he and he only could now claim. He answered the question by saying that he had not resorted to the Berlin courts, and until those courts had decided that the two orders issued by them had no validity against the German Government, or until the German Government refused to respect the decision of its own courts, the respondent had not shown that it was not he but the German Government that was preventing payment of the decretal amount. SHERIDAN, J., expressed similar reasons. This order is the subject of the first appeal.

Their Lordships on advising leave to appeal permitted further evidence to be adduced before them as to the German Law, and the acts of the parties in respect of the two orders of attachment. They feel confident that if the facts had been as fully disclosed to the Court of Appeal as they have been to themselves the order in question could never have been made. It is now apparent that at no time were the debtors themselves prevented by the order of attachment obtained in the Berlin courts from themselves pursuing what remedies they had against the German Government. From 1925 to 1932, indeed, they alone and not the creditors possessed whatever rights of recovery existed. That they understood the legal position is established by the fact that in Mar., 1927, they applied for execution against the German Government

of the Mixed Arbitral Tribunal award. Their application was dismissed by the Registrar of the Landesgericht. They then appealed to the 10th Civil Chamber of the Landesgericht who, in May, 1927, dismissed the appeal. They then appealed to the final Court of Appeal, the Kammergericht, who, in Feb., 1928, dismissed the appeal. The grounds of the refusal were the same in each case, viz., that they could not get an order for execution without producing a certified copy of the award from the German agent attached to the Mixed Arbitral Tribunal, and this had been refused to them by the agent, though they had been granted a copy for purposes of execution against the German Bank of East Africa. In the opinion of the final Court of Appeal the German Government agent is "specially in the position of a custodian of the interests of the German State where the latter itself is a party to the proceedings. It must be left to his conscientious discretion to consider the grounds on which he may refuse to issue the certified translation." There is nothing to indicate that at any material time the German Government agent ever swerved from his conscientious decision not to permit the means of execution against his Government. It was suggested by Dr. Brunzlow in his affidavit filed on behalf of the debtors that there was another legal proceeding open to the creditors, viz., to bring an action against the German Government in the German courts for a declaration that the award was binding. This, it is said, would have shown the invalidity of the plea then put forward by the German Government that the amount of the award was covered by the Dawes or Young Plan, for it could be shown that those plans did not apply to nationals of Czechoslovakia, who was not a party to the plan. Dr. Cohn's affidavit makes it reasonably clear that such an action would not lie. But if it would it is quite plain that up to 1932 the debtors alone could have taken it, and that it never occurred to them to commence any such action. Dr. Brunzlow, himself the legal representative of the debtors, who had acted for them in the abortive attempts to obtain execution, wrote on June 20, 1928, to Dr. Steiner, representing the creditors, reporting the failure of the final appeal, and saying: "In the meantime I continue to negotiate with the central authorities and I have taken all imaginable steps in order to obtain at last a reasonable settlement of this affair. So far all my endeavours have been without avail. From a legal point of view we are powerless." The legal position was not altered by the attachment order obtained in 1932. According to Dr. Cohn it left the debtors still competent to take what proceedings were available against the Government. In any event, there is no indication that after the date of the attachment the prospects of recovering any money from the Government were any better than before. Mr. Markus indeed was not fettered in his contentions by the legal proceedings. He put forward a case that in 1929 he had arranged

with the proper official of the Treasury (unnamed) for payment of the amount of the award if the attachment decree were withdrawn, and that it was only due to the unreasonable refusal of the creditors to accept this condition that payment failed to be made. The proceedings and correspondence make it quite clear that at no time was any responsible officer of the Government able and willing to pay the claim: and Mr. Markus's statement seems to be quite inconsistent with a statement in his later affidavit that an official had explained that his debt could not be paid without admitting claims for milliards of marks from Roumanian and Polish claimants. The story cannot be accepted.

The debtors have to prove affirmatively that the claim in respect of which the bankruptcy notice was issued could and would have been paid but for some act or omission on the part of the creditor. They have entirely failed to prove any part of such a case. The evidence is that throughout they could have taken any possible proceedings against the German Government: that they did take the only proceedings their lawyers thought available and failed: and there is not any satisfactory evidence that at any time there were any proceedings available which would have resulted in the German Government paying the debt. It would probably be sufficient to say that in any event any proceedings by the creditor would have been attended by considerable expense and considerable chance of failure, and it is difficult to conceive of an equitable plea which is based upon the creditor having to take proceedings at his own expense. Their Lordships have already said that had the full materials been available in East Africa it is unlikely that the Court of Appeal would have accepted the debtors' plea. As the evidence now stands the case made by the debtors on this point is fantastic.

Counsel for the debtors took a further point before their Lordships that does not appear to have been argued before either of the courts below. It has been decided by a line of cases in England that where execution is proceeding against the debtor, the creditor is not entitled to issue a bankruptcy notice. That would offend against the spirit of the section which only gives permission to issue such a notice on a judgment, execution thereon not having been stayed. Where goods have been seized under a writ of *fi. fa.* another writ of *fi. fa.* will not be issued pending completion of the first. The principle is found asserted in *Re Phillips* (2). Applying this principle it was contended that the attachment orders obtained in Berlin were in the nature of execution, that their effect must notionally be transferred to Kenya; and that by analogy there must be deemed to have been an execution pending on the Kenya decree which made it improper to issue a bankruptcy notice against the debtors. From one aspect this is but a repetition of the contention of which their Lordships have just disposed. But as an

independent point it fails. *Re Phillips* (2) is an instance of a rule which turns upon the execution of judgments. It does not apply to attachment of shares, or a garnishee order *nisi* or to an infructuous garnishee order absolute. In this particular case it is sufficient to say that the attachment orders were not a form of execution; this first was obtained before any decree had been obtained even in Vienna and the second was merely an extension of the first. In the second place even if they had been forms of execution they were not in execution of a Kenya decree obtained years after the first and a year after the second. In the third place if they had been forms of execution they had proved abortive and there was no reasonable prospect of any money being received under them.

The first appeal must be allowed, the orders made by the Court of Appeal, dated Jan. 10, 1934, should be set aside, and the order made by Lucie Smith, J., dated Oct. 26, 1933, should be restored.

The second appeal raises a different point. On June 20, 1933, the decree in favour of the creditors against the debtors was made in the Court of Appeal for 210,501 shillings, as already stated. In Kenya the procedure in execution follows the Indian Code, and not the English, and arrest and imprisonment of the debtor is a normal form of execution.

In pursuance of the rules the creditors on Oct. 18, 1933, gave written notice that they would apply for execution by imprisonment of the debtor, and on Nov. 7 the application was heard before Webb, J. The debtors were examined as to their means and disclosed that in May, 1932, they had transferred their assets to a private limited company, from whom they were receiving as directors £750 a year. It was contended before Webb, J., that the court could only make a receiving order where it could make a committal order and that under Ord. xix. r. 37 (Kenya) it could not make a committal order where the debtor was unable from poverty or other sufficient cause to pay the judgment debt. The learned judge pointed out the obvious answer that the power to commit is not given by rule 37, but that on the contrary it is a rule giving a discretion not to commit after taking into account the various considerations mentioned in the rule. He took into account what he found to be the fact, viz., the refusal or neglect on the part of the debtor to pay some part of the decree when he had had the means of paying it, and being in a position to commit if he thought fit, decided to act under the Bankruptcy Ordinance, 1930, s. 99, and in lieu of committal made a receiving order. Their Lordships have no doubt that the reference to committal in this section is to committal under the Code of Civil Procedure and the rules. On appeal the Court of Appeal set aside the receiving order, but their Lordships have found difficulty in appreciating their reasons. They appear to have thought that imprisonment for debt in Kenya depends upon enactments similar

to the English Debtors Act, 1869. It is clearly intended, it is said, that imprisonment for debt is to be treated in the same way as it is under the Debtors Act. The learned judges thereupon inquired whether there was proved anything in the nature of contempt and coming to the conclusion that there could be no contempt in omitting to pay part of the debt, but that to constitute contempt it must be shown that the debtor having means to pay the whole had omitted to pay the whole, decided that there was no jurisdiction to commit. They have omitted to notice that so far from the provisions in Kenya indicating that imprisonment for debt is to be treated in the same way as it is under the Debtors Act the very opposite is the case. The Debtors Act abolished imprisonment for debt except in special cases: the Kenya Ordinance and rules imposes it as one of the ordinary means of execution. It is true that there are many humane provisions permitting the court to make more lenient orders than committal. But r. 37 does not purport to give the jurisdiction to commit, it merely gives a discretion not to commit, the jurisdiction having been given by the Civil Procedure Ordinance and rules made thereunder. How the learned judges came to encumber themselves with the English decisions under the Debtors Act as to when the debtor is in contempt is difficult to understand. The Kenya provisions are part of a different Code to that obtaining in England, and should be construed independently. So construed they afford no ground for disturbing the decision of WEBB, J. Their Lordships find it unnecessary to pass any opinion upon the views expressed by the members of the Court of Appeal upon the construction of the English Act. This appeal should be allowed. In the result the bankruptcy notices dated Aug. 21, 1933, are effective, as is the receiving order dated Nov., 1933. Presumably bankruptcy proceedings will continue on the receiving order, the non-compliance with the bankruptcy notices constituting antecedent acts of bankruptcy. Their Lordships will humbly advise His Majesty in accordance with the conclusions they have reached above. The creditors should have the costs of the appeals to the Court of Appeal for Eastern Africa and to the Privy Council. Their remedies in respect of such costs will of course depend upon the law of Kenya in respect to orders for costs made against debtors against whom a receiving order has been made.

Solicitors: *Linklaters & Paines* (for the appellant); *Birbeck, Julius Edwards & Co.* (for the respondent).

[*Reported by* S. P. KHAMBATTA, ESQ., *Barrister-at-Law.*]

MANN *v.* MANN.

[King's Bench Division (Porter, J.), **March 5, 11, 1936.**]

Divorce—Maintenance order—Subsequent agreement for payment of maintenance and for settlement of accounts—Action for arrears—Judgment for plaintiff—Further action for arrears—Estoppel—Absence of consideration—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49) *s.* 190.

The plaintiff and the defendant were divorced in 1925, and an interim order for maintenance was made on Dec. 21, 1925, for payment to the plaintiff of £3 10*s.* a week. In Feb., 1927, an agreement was entered into whereby the defendant was to continue to pay £182 per annum but the payments were to be quarterly. The agreement also provided, *inter alia*, that each party should give to the other full discharge of all sums claimed and that all actions, claims, demands at law and otherwise were withdrawn by consent. Payment fell into arrears and the plaintiff brought an action in the Mayor's Court for the amount then owing. The defence was withdrawn and judgment consented to. Payments again fell into arrears and the present action was brought in respect of them. The defendant contended that, as the agreement provided for the payment of a sum which the defendant was already liable to pay, it was void for want of consideration. The plaintiff replied that the defendant was estopped from relying on this defence by the proceedings in the Mayor's Court which arose out of a breach of the same agreement :—

Held : (i) there was no estoppel inasmuch as there was no evidence that judgment in the Mayor's Court was based on the agreement. It might have been consented on because the money was in any event due under the maintenance order.

(ii) the settlement of all accounts and claims was good consideration for the agreement and the plaintiff was entitled to succeed.

[**EDITORIAL NOTE.** The agreements in respect of maintenance which have been avoided by the court have been such as tend to oust the jurisdiction of the court. The agreement here seems to have been no more than a slight variation of the terms of the order for maintenance and this no doubt explains the attack upon it that it was without consideration. As, however, it operated as a release from certain claims there seems little doubt that it was not *nudum pactum*.

For the position under a Maintenance Order, see HALSBURY, Hailsham Edn, Vol. 10, pp. 793, 794, para. 1257-1260, and for Cases, see DIGEST, Vol. 27, p. 510, Nos. 5476-5480.]

Cases referred to :—

(1) *Cooke* v. *Rickman*, [1911] 2 K.B. 1125 ; 21 Digest 178, *295*.
(2) *Underwood* v. *Underwood*, [1894] P. 204 ; 27 Digest 545, *5965*.
(3) *Maidlow* v. *Maidlow*, [1914] P. 245 ; 27 Digest 505, *5408*.
(4) *Hyman* v. *Hyman*, [1929] A.C. 601 ; Digest Supp.
(5) *May* v. *May*, [1929] 2 K.B. 386 ; Digest Supp.

Action for payment of arrears under an agreement dated Feb. 17, 1927, which provided for quarterly payments by the defendant of £45 10*s.* The facts and arguments appear from the judgment.

H. C. Leon, for the plaintiff.

F. S. Laskey and *Theodore Turner*, for the defendant.

PORTER, J.: This is an action brought by Mrs. Hilda Mann against Mr. Philip Ernest Mann upon an agreement dated Feb. 17, 1927. Mrs. Mann was formerly the wife of Philip Ernest Mann, but the parties have been divorced. *Prima facie* the agreement is valid, *prima facie* there is good consideration, and therefore *prima facie* the plaintiff, Mrs. Mann, would be entitled to recover the amount which she claims upon it. The matter does not depend solely upon the agreement, because the position is this: the parties, as I have said, were divorced, a decree *nisi* being pronounced on Apr. 22, 1925. There was a petition for maintenance on Apr. 23, 1925, and an answer on May 15, 1925, and an interim order for maintenance on Dec. 21, 1925, that order being for payment of £3 10*s*. a week. Under that order apparently payments were made, but I am told, though the exact reason is not very material, that it was desired to change the weekly to a quarterly payment, and the agreement of Feb. 17, 1927, was then entered into. That agreement states that the defendant agrees to continue to pay £182 per annum, that is the £3 10*s*. a week, less income tax, to the plaintiff in future by quarterly instalments. It also provides that the defendant will pay for the son's education and boarding fees, and it is finally agreed that:

> by this present agreement each party gives full discharge to the other of all sums claimed on whatever reasons thus settling their mutual accounts as well as all differences between the parties concerning their former relations. It is also understood between the parties that all actions, claims, demands at law or otherwise are forthwith withdrawn by consent.

The payments under this agreement continued to be paid for some time, but at a date which I have not got at the moment before me the defendant ceased to pay and an action was brought in the Mayor's Court for the payment of the arrears. I have before me particulars which are dated May 2, 1934, and they are for two quarters' maintenance, £45 10*s*. each. These particulars were accompanied by a summons and answered by an affidavit of the defendant, who said that the position had altered and that "maintenance has been regularly and punctually paid by me since 1927, but my financial position is such that I cannot afford to pay more than £1 per week from Jan. 1, 1934, which I am willing to do." On that summons the defence was ultimately withdrawn and judgment was consented to. The defendant, as I understand, continued to pay, but eventually fell into arrears, with the result that the present action was brought for the arrears.

The plaintiff claims that the agreement is a good and enforceable one, and that in any case, even if it were not, the defence which is now put forward by the defendant is one which it was open to him to put forward in the former Mayor's Court proceedings; that he is bound by the result of those proceedings and is estopped from putting forward a similar defence again. For that principle the case of *Cooke* v. *Rickman*

(1) is quoted. I may as well dispose of that question at once. I fully agree and appreciate the position of *Cooke* v. *Rickman* (1), and I think that it might well be in certain cases that that defence ought to prevail. I cannot say that it prevails here. I am not determining the case on that point for this reason, that it may quite well be that though the defence in that action was open that the agreement did not supersede the order for maintenance, the defence was not that the order for main tenance was not superseded by the agreement of Feb. 17, but was or might have been merely that the defendant's position had changed, and it may be that the true reason for the submission to judgment in that case and the payment of the money was not because it was due under the agreement, but because it was due anyhow by reason of the order for maintenance. I do not think on the facts before me that I have sufficient material to determine that issue or to determine that part of the matter on behalf of the plaintiff.

But that leaves open the other part of the case, and that is this: it is said that there is no consideration for the agreement of Feb. 17, and it is said for this reason, that once an order for maintenance, if one may so put it, always an order for maintenance; the wife cannot get rid of her rights, and therefore she can offer no consideration for the agreement. That being so, if there is no consideration for the agreement the husband certainly has an obligation, and that is an obligation under the original order for maintenance and not an obligation under the agreement. If that is so, it is said that there is not an obligation to pay necessarily the whole sum; that the defendant has a right at any time to make application to have it varied, and that the sum which is ordered to be paid is a personal allowance, and if the wife has succeeded in getting on without it for a time the court by no means necessarily will order the whole of the arrears to be paid, but will only give sufficient to maintain the wife having regard to the position which has now been reached. In certain circumstances no doubt that is the true position. It may well be in certain circumstances that the original order is not superseded by the agreement between the parties, but it is ultimately—and it has been so argued before me—a question of consideration. The question here is, is there apart from the mere question of an order for maintenance an agreement which can be enforced? Now this particular agreement provides for a number of matters quite apart from the question of the wife's right to maintenance. It provides for the settling of all mutual accounts, for the settling of all differences, and for the withdrawal of all actions, claims and demands at law or otherwise. It does not appear at all from the agreement that it is solely concerned with questions of maintenance from the husband to the wife, and on the face of it the agreement has perfectly good consideration. In those circumstances I find that there is consideration for the agreement and that the agree-

ment is one enforceable apart from all questions of maintenance in the case.

Now the actual provision with regard to maintenance itself is contained nowadays in the Supreme Court of Judicature (Consolidation) Act, 1925. Sect. 190 (1) provides for the provisions of the maintenance by means of a settlement or security, and in subsect. (2) where no such settlement or security takes place, for the payment by the husband to the wife during their joint lives of such monthly or weekly sum as the court may think reasonable. Curiously enough, the caption to that section is "Alimony," which is perhaps its least important point. It is really for the provision of maintenance and not for alimony. I ought to say that the section provides for the discharge or modification of the order under the proviso to subsect. (2), but some discussion took place before me as to whether the provision itself or the proviso had any reference to an interim order. It was said that sect. 190 relates to final orders and that interim orders differed, and the court had no power to alter an interim order; it could, of course, discharge it in making the final order, but in the meantime the interim order ought to stand. My own view, and I need not express any final opinion upon it, is that really the provision with regard to interim orders is contained in subsect. (3), which says that the court may make interim orders for the payment of money by way of alimony or otherwise. I referred to the question of alimony as part of the caption, because some dispute arose as to what the meaning of "otherwise" was there. I think that "otherwise" there is put in just as they put in "alimony" in the caption, not because alimony is the chief thing, but because it is one of the things, and that "otherwise" includes maintenance as well. In those circumstances, in my view the right exists in the case of alimony to vary interim orders, and if the right exists in the case of alimony, it also exists in the case of maintenance—at least, under subsect. (3), I think the right to vary interim orders is given. That, of course, does not strictly arise here, because of my finding that there is good consideration for the agreement, but it disposes of another argument put forward on behalf of the plaintiff that in any case the husband had no right to defend the action on the ground that the plaintiff is entitled to recover in respect of an interim order.

In the course of the proceedings a number of cases were quoted dealing with the question of the inability of a wife, or indeed of a husband, to prevent the court retaining control of the amount provided for maintenance, and it is said that this fell within those provisions. Cases like *Underwood* v. *Underwood* (2), *Maidlow* v. *Maidlow* (3), *Hyman* v. *Hyman* (4), and *May* v. *May* (5) were quoted. The general result of those cases is, I think, this, that the wife cannot lose her right to maintenance except in a case where an agreement has been made by the parties which the

court could not impose, that is to say, for instance, where the order of the court is that the provision should be made during joint lives, if by consent of the parties provision is made not for joint lives, but for some other time, then the agreement is a valid agreement and is not simply a substitute for the provision for maintenance; it is something which can be enforced, despite the fact that maintenance would otherwise be ordered, because the court could not impose those terms, and those terms could only be obtained by consent.

Fortunately, owing to my other finding, I am not obliged to construe this document or find what it actually means with regard to the length of time during which it lasts. If any appeal is desired, that point will be open to either party to maintain. The parties have not provided for how long the agreement shall exist, except to say that in future Mr. Mann shall pay the present plaintiff so much money. I think if I were asked to construe it myself, although it is not necessary to do so, I should say that meant during the joint lives, and for this reason that there is provision in the agreement saying "Pay in the future in quarterly instalments" sums to provide for a continuance of the obligation for the payment which is provided in the interim order. However that may be, I find that in the particular case there is no doubt good consideration for the agreement; I think the wife is entitled to enforce it; and I give judgment for her with costs.

Solicitors: *J. D. Arthur & Co.* (for the plaintiff); *Raymond Oliver & Co.* (for the defendants).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

SIR EDWARD C. BOWEN *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Lawrence, J.), **April 7, 1936.**]

Income Tax—Surtax—Deduction—Annuity—Deficiency of income from fund appropriated—Made up by advance charged on residue—All Schedules Rules, r. **19.**

By his will the appellant's father directed that the residue of his estate should be charged with an annuity to the appellant's mother and subject thereto should be held for the appellant and his brother equally. The executors appropriated certain investments as an annuity fund for the purpose of paying the annuity, and they appropriated other securities for a residuary fund. At the request of the appellant and his brother the investments representing the residuary fund were not divided between them. The commissioners held this to be an assent by the executors to the residuary bequest taking effect. In 1931 the income of the annuity fund was insufficient to pay the annuity. The income of the residuary fund was added, but the income still being insufficient, an overdraft was obtained, secured by the investments representing the residuary fund. The appellant sought to deduct as an annual payment for surtax purposes his share of the amounts borrowed to make up the deficiency in the annuity :—

HELD : the deductions were properly made.

[**EDITORIAL NOTE.** The question here is whether the sum paid is a good deduction under the General Rules applicable to All Schedules, r. 19. The question as to the ultimate liability to make good the deficiency in the annuity appears not to have been settled, and the residuary legatees by the machinery of an overdraft secured upon the residuary estate made good the deficiency. The holding is that such a payment is an annual payment within the above rule and a proper deduction for ascertaining the income liable to surtax.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 278-283, paras. 549-560, and FOR CASES, see DIGEST, Vol. 28, pp. 111, 112, Nos. 683-689.]

CASE STATED under the Finance Act, 1927, s. 42 (7) and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts, who upheld the decision of the Commissioners of the Inland Revenue refusing to admit a claim under the provisions of Finance Act, 1923, s. 24 (as extended by Finance Act, 1927, s. 42 (3)) for adjustment of the surtax assessments made on the appellant for the years to April 5, 1932 and April 5, 1933, on the ground that the assessments were excessive by £1,076 and £1,198 respectively owing to the appellant's returns not showing those sums as legitimate deductions from his total income.

J. Millard Tucker, K.C., and *Cyril King*, for the appellant.

The Attorney-General (*Sir Donald B. Somervell, K.C.*), and *Reginald P. Hills*, for the respondents.

LAWRENCE, J. : In this case I regret I am unable to agree with the conclusions, partly of law and partly of fact, of the commissioners. It is an application under the Finance Act, 1923, s. 24, for relief in respect of surtax. The question that I have to decide is whether the appellant,

Sir Edward C. Bowen, was entitled to deduct under the Income Tax Act, 1918, s. 27, his share of the amounts borrowed by the trustees of his father's will from the bank for the payment of an annuity to his mother under his father's will.

By his father's will there was left to his mother an annuity free of tax. There were then left what was called settled legacies to his sisters and to himself and to his brother. There was a trust for sale, and the residue was first charged with the annuity to the mother and was then to be held for him and his brother equally. The executors appropriated certain of the investments of the estate as what is called an annuity fund for the purpose of paying the annuity to Lady Bowen, and they appropriated other securities for the purpose of the residuary fund. In 1928 a formal request was made by Sir Edward Bowen and his brother requesting the executors, instead of dividing between them the stocks mentioned in the schedule to the document, which were the stocks which had been appropriated to the residuary fund, to retain the same, and if requested by the different companies to be removed from the register as executors to have the same registered in their names as individuals. That transaction has been held by the commissioners to be an assent by the executors to the residuary bequest taking effect. In 1931, owing to the slump, the income of the annuity fund was discovered to be insufficient to pay the widow's annuity and tax thereon. I am now reading from para. 5 of the case :

> The trustees during the years now in question used both the annuity fund and the residuary fund income to pay the annuity and tax thereon, but this was insufficient, and the balance was found by borrowing from the bank on overdraft secured by the investments representing the shares of the appellant and his brother of the residuary fund. This method of meeting the deficiency was adopted to avoid the sale of shares at an abnormally low price. After 1931 the annuity fund and the residuary fund were merged in the trustees' accounts and the debit balance of the income account of this fund was left in the accounts so that the trustees could see the amount of the total debit items in the account which would, in the trustees' view, have primarily to be set against the residuary capital. The debit balance would accumulate until it amounted to the capital of the residuary fund. Until the overdraft had reached the amount of the residuary fund it was not possible to encroach on the capital of the annuity fund.

Those are, I think, the material facts. The appellant is seeking to deduct as an annual payment his share of the amounts which were borrowed from the bank to make up the deficiency of the annuity payable under the will to his mother. It was contended for the appellant, first, that after 1928, the residuary fund was held by the trustees on behalf of the appellant and his brother as agents or bare trustees ; secondly, that if the view of the trustees was right that the annuity to Lady Bowen must be met out of the residuary fund, in the event of the income of the two funds being insufficient, the borrowing upon the security of the

residuary fund was equivalent to a compulsory payment which fell upon the appellant and his brother and could be deducted under the General Rules, r. 19; thirdly, that if that view was incorrect and the sum might have been raised by realisation of the annuity fund, the true inference was that borrowing upon the security of the residuary fund, to which the appellant and his brother were then solely entitled, was carried out as a matter of contract in consideration of the trustees refraining from realising at a sacrifice the annuity fund to which the appellant and his brother would ultimately be entitled, and that such borrowing was equally within the said rule 19.

The Crown, on the other hand, contend that the merger of the two funds by the trustees in 1931 indicated that the appellant and the trustees were revoking the assent of 1928. I pause to observe there that the merging of these two funds could not indicate any consent on the part of the appellant's brother to the revoking of the assent of 1928. The Crown further contends that the trustees were, therefore, making the payments necessary to make up the annuity to Lady Bowen as trustees under the will and not on behalf of the appellant and his brother, and that in so far as the appellant and his brother were concerned, they voluntarily concurred and were, therefore, not entitled to deduct the sums borrowed. The Crown also relied upon the fact that after 1931 the appellant did not return as his own income his share of the income of the residuary fund. As the claim here is for repayment on the ground of mistake, I do not think that this contention ought to affect my judgment. In my opinion the contentions put forward by the appellant are right and he is entitled to succeed. There is no doubt that the burden of payments made will ultimately fall upon him and his brother. I see no reason for holding that the raising of the loan in question upon the security of the residuary fund, which the commissioners have held took effect as a residuary bequest in favour of the appellant and his brother in 1928, was a mere voluntary gift by them to their mother. I think, on the contrary, that the facts found by the commissioners that the method of meeting the deficiency was adopted to avoid the sale of the shares at an abnormally low price and that the residuary fund only was charged as security lead to the conclusion that the borrowing on that security either was carried out upon the view that that fund was primarily liable or was agreed to by the appellant and his brother as a matter of contract in order to safeguard the investment to which they would ultimately be entitled. The commissioners have not, I think, found facts which are inconsistent with this view, and I think, therefore, that appeal should be allowed with costs.

Solicitors: *Bischoff, Coxe, Bischoff & Thompson* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

M. OTTO AND E. OTTO *v.* BOLTON AND NORRIS.

[King's Bench Division (Atkinson, J.), **March 31, April 1, 2, 3. 8, 1936.**]

Sale of land—Purchase of new house from builder—Warranty. Negligence—Negligent construction of house—Liability in tort to person injured.

The first plaintiff contracted with the defendants for the purchase of a newly-constructed house informing them that on account of the health and nervousness of the second defendant she desired to be assured that the house was well built. The defendants thereupon assured that the house was well built and the sale was completed. About a year later a large part of the ceiling in one of the bedrooms fell on the second plaintiff and seriously injured her. Later there were further falls. Both plaintiffs claimed damages:—

Held: (i) the first plaintiff was entitled to damages for breach of warranty.

(ii) the claim of the second plaintiff being in tort failed, as the builder of a house, even though he is building for the purpose of sale, is under no obligation towards persons who may come to live in it to take reasonable care in the building.

Semble: A builder selling a house after completion is not, in his capacity as builder, under any obligation to the purchaser.

[**EDITORIAL NOTE.** The main point in this case is whether a builder of a new house is liable in tort. It has been settled in *Miller* v. *Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113; Digest Supp. that the builder selling an uncompleted house may be liable to the purchaser upon an implied warranty. In the case of a completed house it is here suggested that there is no implied warranty, but that can only be *obiter*, since there was an express warranty in the present case. Upon the further point of the liability to a person other than the purchaser, it was sought to bring that position within the doctrine of *M'Alister (or Donoghue)* v. *Stevenson*, [1932] A.C. 562; Digest Supp.; but without success. As is said in the judgment, the sale of land and property is a transaction to which the maxim *caveat emptor* applies with singular strictness and certainly with much greater strictness than the sale of goods. It would seem, therefore, that a builder is not liable for damage due to bad workmanship otherwise than in contract.

For the Law on the Point, see HALSBURY, 1st Edn., Vol. 25, Sale of Land, pp. 297-301, paras. 503-509 and Supp., and for the Cases, see DIGEST, Vol. 40, pp. 42-51, Nos. 262-330, and Supp. Nos. 2922 (*a*)-2922 (*c*).]

Cases referred to:

(1) *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30; 39 Digest 420, *526*.
(2) *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215; 39 Digest 420, *525*.
(3) *Collis* v. *Selden* (1868), L.R. 3 C.P. 495; 29 Digest 10, *125*.
(4) *Malone* v. *Laskey*, [1907] 2 K.B. 141; 36 Digest 14, *55*.
(5) *Bottomley* v. *Bannister*, [1932] 1 K.B. 458; Digest Supp.
(6) *Cavalier* v. *Pope*, [1906] A.C. 428; 12 Digest 49, *273*.
(7) *Robbins* v. *Jones* (1863), 15 C.B.N.S. 221; 36 Digest 136, *900*.
(8) *Lane* v. *Cox*, [1897] 1 Q.B. 415; 31 Digest 347, *4896*.
(9) *M'Alister (or Donoghue)* v. *Stevenson*, [1932] A.C. 562; Digest Supp.
(10) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; 36 Digest 8, *9*.
(11) *Chapman or Oliver* v. *Saddler & Co.*, [1929] A.C. 584; Digest Supp.
(12) *Caledonian Railway Co.* v. *Mulholland*, [1898] A.C. 216; 36 Digest 14, *53*.

(13) *MacPherson* v. *Buick Motor Co.* (1916), 217 N.Y. 382.
(14) *Farr* v. *Butters Bros. & Co.*, [1932] 2 K.B. 606; Digest Supp.

ACTION for damages for breach of warranty, breach of contract, and for injuries caused by the negligence of the plaintiffs. The defendants sold to the first plaintiff a completed house on a building estate, describing and warranting it to be well built. After about a year's occupation, several falls of ceiling occurred. The first plaintiff, the purchaser, sued for breach of warranty, and for negligence. The second plaintiff, the mother of the first, who occupied the house with her and was seriously injured by one of the falls, sued for damages for personal injuries. The facts and arguments appear fully in the judgment.

F. J. Tucker, *K.C.*, and *W. E. P. Done*, for the plaintiffs.

Wilfrid Clothier, *K.C.*, and *G. O. Slade*, for the defendants.

ATKINSON, J.: In the summer of 1933, Miss Otto, the first plaintiff, was looking for a house, and among other places, she visited the Tillingbourne Estate, Finchley. This estate was being developed by the defendants. The defendants were builders, and they built and were the owners of a number of houses on the estate. Both Miss Otto and Norris are very vague as to the number and dates of their interviews before Sept. 8. I gather that he had shown her over No. 8 before that, but there was one bedroom less than she wanted, and other houses had been looked at. However, it is clear that two or three days before Sept. 8, they were back in No. 8, and Mr. Norris told her that he could construct another room on the attic floor, that the house had been designed so that this could be done if wanted, and he offered her the house at £2,500 as it stood, or £2,550 with the additional room. The plaintiff was very hesitant, and told Norris about her mother, that she was old and nervous and did not trust new houses, as she did not think that they were very well built. Norris assured Miss Otto that the house was very well built, that there was nothing to be afraid of, and that it was better built than Preston's houses. Thus reassured, on Sept. 8 she saw him again. He produced two forms of contract and got her to sign one and he signed the other. She had not come prepared to pay a deposit, but he produced one of his own cheques—he banked at the same bank—and persuaded her to pay him a deposit of £250, with the usual talk about missing the house and someone else being after it. According to Miss Lily Otto, whom I believe, he said that there was no need for surveyors or solicitors; it was only a waste of money, as the house was very well built.

Norris says that he advised the plaintiff to have a surveyor to examine it before buying. I do not believe that, but if it were true, he took very great care to get a signed contract and a signed cheque before she obtained any assistance or any advice whatever. She said that she relied on his assurance as to the house being well built and that she

would not have bought it but for that assurance. I accept her evidence as to that. Norris admits that he assured her that the house was well built; he says that it was a serious statement, which he knew would influence her mind, and that he intended the plaintiff to believe that he was selling a well-built house and intended her to think that he was promising that it was a well-built house. I have no doubt that this statement amounted to a warranty.

In *Heilbut, Symons & Co.* v. *Buckleton* (1), at pages 49 and 51, Lord Moulton lays down the test. He approves a very relevant passage from one of the judgments in *De Lassalle* v. *Guildford* (2) which is worth reading: "To create a warranty, no special form of words is necessary. It must be a collateral undertaking forming part of the contract by agreement of the parties express or implied, and must be given during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it." Then the passage that follows: "In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant" has been expressly disapproved, but the earlier part of what I read was approved in *Heilbut's* case (1), and, I think, lays down the true test. I have no doubt here that the statement amounted to a warranty. I am quite satisfied that Norris intended it to be a contractual promise collateral to the contract of purchase. I am satisfied that he knew that the contract was entered into on the basis of this assurance that he had given, and I am sure that Miss Otto believed the assurance, and in her turn accepted it as the basis of the contract, and on the strength of it signed the contract of Sept. 8, and ultimately completed.

In pursuance of this undertaking Norris proceeded to construct the new room, and on Sept. 20 Miss Otto and her surveyor went to inspect it. He advised her that the windows were too small, and on Sept. 21 she wrote refusing to complete the purchase unless proper windows were put in. Norris agreed to alter one of the windows, and proceeded to do it. All the work, including the great bulk of the decorating, was completed by Oct. 3. On Sept. 22 the surveyor, who had been with Miss Otto to the house, sent a report to her solicitors. That report cannot affect the question of the warranty or the strength of it; she had already signed a contract to purchase and paid a deposit, and the work which was to be done as part of the bargain had been, to a great extent, completed. I am satisfied that in fact she never saw the report, but I have no doubt that the surveyor had said to her very much what he ultimately put in his written report. Miss Otto wanted two additional wall lights in each of the sitting rooms and this work necessitated the electricians, who were employed to do it, going into the attic.

The work, according to the defendants, was done about Oct. 11 or 12

by a man named Couchman, and the work was done under the supervision of a man named Wicks, who was the foreman of Messrs. Johnson, O'Sullivan & Co. The work took from one and a half to two days. On Oct. 3 a more formal contract had been signed; there was very little difference between that and the first contract, but there was a paragraph, para. 6, which said: "The vendors will complete the house and the decorations thereto to the reasonable approval of the purchaser before the completion of the purchase." Some reliance is placed upon that undertaking by the plaintiffs, but I agree with Mr. Clothier that it has to be construed with reference to the surrounding circumstances. I must believe the evidence of the electricians and Norris about this, that the house was a completed house, even in the form in which it was being sold; the alterations had then been carried out and the house was complete. This undertaking to complete the house and the decorations cannot, in my view, have any reference to the construction of the house; it can only refer to the little decoration that at that time needed to be done. I do not think that clause can help the plaintiffs much in this case. Possession was taken on Nov. 11. After that date nothing whatever was done on the attic floor except, according to Wicks, one or two electric fittings were supplied, including two pendants in the roof room. It is not clear when the two pendants were fixed, it may have been that they were fixed after Nov. 11. I think that Mr. Wicks did mean that there were a few fittings which were put in after possession was taken, but at any rate he was perfectly clear about this, that after possession was taken no work whatever was done in connection with those four new lights, and that no work whatever was done over those uncovered joists.

On May 11 a large part of the ceiling in the back bedroom fell, and it fell on the plaintiff, Mrs. Otto, and severely injured her. The lady was recovering from quite a severe illness; she had had a slight stroke, but she was very much better. She had recovered the use of an arm and a leg, which had been temporarily affected, and according to the doctor, he was hoping to get her up in a day or two. The result of this fall, as one might expect, was to throw her back very considerably. She suffered from concussion, and for some little time she was in a comatose condition, and there is no doubt that for some weeks this accident had a very serious effect upon her health and her comfort.

Miss Otto called in Norris junior the very same day. He went upstairs and saw for himself what had happened. He did not go on to the joists, but he had a very good opportunity for examining and seeing what was wrong. Kennard was brought in the day after by the plaintiff. There were further falls. On May 22 there was a further fall on the landing. In March of the following year and again in April there were two falls, one in the small back bedroom, that was Apr. 10, and a second

fall in the large back bedroom on Mar. 14. Then the plaintiff was advised to re-do the whole first-floor ceiling, the ceiling, that is to say, over all the rooms on the first floor, and this work was done. Rason, who was called by the defendants, said that it was a perfectly reasonable thing to do, and that they were justified in putting in an entirely new ceiling.

[His Lordship reviewed the evidence.] I am driven to the following conclusions: I am satisfied that the plaster used was badly and unevenly mixed, the hair which gives the plaster strength was very badly distributed; when dry much of the plaster would crumble easily; it was like powder and had insufficient strength; the plaster was thicker than in normal practice, thus adding to the weight of the ceiling; the keys were in many places insufficient; there was an excessive number of broken keys; the lumps were placed there in a vain attempt to make good, faulty work, work known to be faulty and they were put there by the men or man who did the work of plastering the ceilings.

I am told by the defendants that it is their practice to line with lining-paper and therefore I do not think that the fact that lining-paper was there is a point which tells against them, although it is quite clear that Kennard has the very strongest suspicion as to the reason why the paper was there. However, there has been an explanation of it which there is no reason to reject. I find that the first-floor ceilings were not well built, but were very badly built and were dangerous to people who slept in the house. I find that the men who did the work knew it was bad and must have known it was dangerous. The primary negligence was doubtless that of the men doing the work but the defendants retained the duty of supplying the material and supervising the mixing and examining the work when finished. Their foreman, Norris junior, was negligent in his supervision and examination of the mixing and he and Norris senior, and Bolton were all negligent in their examination of the work afterwards. If they did not know of the bad work and of its danger, it was owing to the negligent and insufficient supervision of the mixing, and the negligent and insufficient examination of the work when finished. I find as a fact that all the falls were solely due to the bad construction of the ceilings, and that the work claimed for was necessary. I see no reason for saying that more money has been spent on the work than was necessary. I am not satisfied that more than two months was reasonably necessary for doing this work, and I think that I ought not to allow more than two-thirds of the rent of the rooms which were taken. Therefore, on that view of the claim, I think Miss Otto is entitled to the sum of £340.

Now the claim of Mrs. Otto is based upon the negligence of the defendants as builders of the house. This claim raises the very difficult question as to whether the builder of a house, which he is building for

the purpose of sale, is under any obligations towards persons who may come to live in it to take reasonable care in the building. It is settled law that the vendor of a house, even if also the builder of it, gives no implied warranty as to its safety. A purchaser can make any examination he likes, either by himself or by somebody better qualified so to do. He can take it or leave it, but if he takes it, he takes it as he finds it. It is, perhaps, the strongest example of the application of the maxim *caveat emptor*. I find in no case any suggestion that a builder selling a house after completion is, in his capacity of builder, under any obligation to take care towards a purchaser, let alone other persons who may come to live in it.

I need refer, I think, to only three cases. The first case which I think is worth looking at is *Collis* v. *Selden* (3). That was a case in which a claim was made for the negligent hanging of a chandelier in a public house. I need not trouble with the details, but there is just one passage from the judgment of WILLES, J., at page 498, that I should like to read:

> Take the case of a man building a house. His workpeople scamp the work: and five or six years afterwards a chimney-stack falls down through a high wind, and injures a person with whom he has no contract, to whom he owes no duty, and as against whom he cannot have been guilty of any fraud. To hold him liable to an action at the suit of the injured person would be going far beyond anything which has been decided in our law.

Then, I need not refer to it, but there is the case of *Malone* v. *Laskey* (4). That was dealing with the liability of a landlord for injury happening to a stranger during the tenancy, owing to the negligent work by one of his workmen, and it was held that there was no such relationship which would enable the injured person to found an action of negligence. But the case which is really conclusive on this matter, subject to the question whether it has been modified by the two recent cases in the House of Lords is the case of *Bottomley* v. *Bannister* (5). There, the precise point was raised, and was discussed. On page 468, SCRUTTON, L.J., said this:

> Now it is at present well-established English law that, in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant, or a vendor of real estate to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, even if he has constructed the defects himself or is aware of their existence.

It may very well be that at that point in his judgment he is only dealing with contract, but on pages 469, 470, 474 he says:

> There remained a claim in tort based on the cases which consider the circumstances under which a person in control of a dangerous thing is liable to persons with whom he has no contract. They have often been discussed. . . . But these are all cases relating to chattels, and appear to me not to apply to real property

or fixtures forming part of houses. . . . My view of the law is that the installation being part of the realty, the cases as to chattels do not apply.

Then Greer, L.J., at pages 476 and 477 lays down the law very very clearly. He points out that there can never be a claim for negligence unless you can find that there was a duty. Negligence means a breach of duty and therefore there has to be a duty. He says:

The important question for determination is whether it was established that there was any breach of duty by the defendants towards the plaintiffs. Does the vendor or lessor of a house owe any duty, independently of contract, to persons who may happen to come to live in the house either by purchase from him, or as his tenants, to exercise reasonable care to see that the house is fit for occupation?

Now, there is the precise question asked. Then he goes on:

It is a commonplace of the law of negligence that before you can establish liability for negligence you must first show that the law recognises some duty towards the person who puts forward the claim. The plaintiffs in this action alleged that the defendants were guilty of a negligent breach of duty towards the deceased in that they failed to attach to the Halliday boiler a flue to carry off the poisonous fumes through the wall into the open air. When the defendants installed the boiler they had not then and might never have had any relations with the deceased. English law does not recognise a duty in the air, so to speak; that is, a duty to undertake that no one shall suffer for one's carelessness. The customer owes a duty to his bank to draw his cheques carefully so that it will be difficult for any holder fraudulently to alter them, but he owes no such duty to every person into whose hands the cheques may come. . . . It seems to me that this principle equally applies to the case of a builder or other owner of property, when the question is whether he owes any duty towards people who may with his consent either as purchasers, tenants, or licensees of purchasers or tenants, come on to his property and be damaged by its defective condition.

He then refers to *Cavalier* v. *Pope* (6), *Robbins* v. *Jones* (7), and *Lane* v. *Cox* (8), and adds:

A purchaser of the freehold is, in my judgment, in no better position than a tenant. No case was cited to us in which a tenant or purchaser has ever recovered against a lessor or vendor, either by implied contract or in tort, by establishing the liability of the vendor or landlord for injuries sustained through the house or its fixtures being unsafe at the date of the sale or of the lease.

Now unless the law there laid down has clearly and plainly been declared to be wrong in the case of *Donoghue* v. *Stevenson* (9), it is, of course, binding upon me. That was a case dealing with chattels, and there is not a word in the case from beginning to end which indicates the law relating to the building and sale of houses is the same as that relating to manufacture and sale of chattels. The case of *Bottomley* v. *Bannister* (5) is, in fact, referred to at page 598 by Lord Atkin without any relevant criticism. There is a significant passage at the bottom of

page 597 in LORD ATKIN'S speech referring to *Cavalier* v. *Pope* (6). He says :

> The wife of the tenant of a house let unfurnished sought to recover from the landlord damages for personal injuries arising from the non-repair of the house, on the ground that the landlord had contracted with her husband to repair the house. It was held that the wife was not a party to the contract, and that the well known absence of any duty in respect of the letting an unfurnished house prevented her from relying on any cause of action for negligence.

Therefore, that is the first difficulty about the suggestion that *Bottomley* v. *Bannister* (5) must be taken to be modified. But supposing Mr. Tucker is right in saying that the principle in *Donoghue* v. *Stevenson* (9) applies to realty as well as chattels ; if that is so it is necessary to determine what exactly the principle is that was laid down in *Donoghue* v. *Stevenson* (9). Now, as I understand it, it is this, that a manufacturer of products is under a duty to take care that they shall not be harmful to a consumer or user if the relationship between them is sufficiently proximate. There was no exhaustive definition of sufficient proximity, but one test was very clearly indicated, the absence of any reasonable possibility of intermediate examination. At page 581 a passage from *Heaven* v. *Pender* (10) in the judgment of LORD ESHER, then BRETT, M.R., is quoted, and I will take it from there rather than from the case itself. Dealing with the question of proximity he says :

> "This" (i.e., the rule he has just formulated) "includes the case of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property."

Then LORD ATKIN goes on :

> I draw particular attention to the fact that LORD ESHER emphasises the necessity of goods having to be "used immediately" and "used at once before a reasonable opportunity of inspection." This is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed.

Again at page 586, referring to a Scottish case, *Oliver* v. *Saddler & Co.* (11), he says :

> I find no trace of the doctrine of invitation in the opinions expressed in this House,

of which mine was one: the decision was based upon the fact that the direct relations established, especially the circumstance that the injured porter had no opportunity of independent examination, gave rise to a duty to be careful.

At page 597, again Lord Atkin refers to the opportunity of inspection in dealing with the *Caledonian Railway* case (12):

> There was ample opportunity for inspection by the second railway company. The relations were not proximate.

Then on page 599, he sums it up, I think:

> My Lords, if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

Lord Thankerton, on page 603, makes the same point:

> The special circumstances from which the appellant claims that such a relationship of duty should be inferred may, I think, be stated thus—namely, that the respondent, in placing his manufactured article of drink upon the market, has intentionally so excluded interference with, or examination of, the article by any intermediate handler of the goods between himself and the consumer that he has, of his own accord, brought himself into direct relationship with the consumer.

Lord Macmillan, at page 618, points out that in an American case, *MacPherson* v. *Buick Motor Co.* (13), Cardozo, J., had emphasised the point that the user of a motor car, or people whom he takes with him, have no opportunity of testing, and he puts his own view on page 622:

> It may be a good general rule to regard responsibility as ceasing when control ceases. So, also, where between the manufacturer and the user there is interposed a party who has the means and opportunity of examining the manufacturer's product before he re-issues it to the actual user;

and then goes on to say that in that case the manufacturer had taken steps to ensure particularly that there could not be any effective examination. Therefore, I think, that the principle really laid down there is that there can be no duty without proximate relationship, and that, at any rate, one of the main tests as to whether proximate relationship exists, is whether there is any reasonable opportunity for examination between the time of the sale or the doing of the work, and the use or consumption of the article by the purchaser.

In *Farr* v. *Butters & Co.* (14) the case in the Court of Appeal since *Donoghue* v. *Stevenson* (9), Scrutton, L.J., extracts precisely this principle from the case. Dealing with that case he says at pages 614, 615:

> There was thus no opportunity of independent examination between the manu-

facturer and the consumer. That proximate relationship, according to the three law lords who constituted the majority, created the liability of the manufacturer. . . . There, obviously, the liability is rested upon the fact that the manufacturer sends out the ginger-beer in such a condition that it cannot be inspected until it is consumed. The impossibility of intermediate examination makes the relation so proximate that there is a liability.

Now even if this principle does apply to buildings which are sold by the man who has built them, it seems to me that it would still be impossible to hold that there was the necessary proximity between the defendants and Mrs. Otto. There was nothing to prevent examination of the house on the intermediate purchase. Indeed, the well-known absence of any duty in respect of the sale of a house makes examination usual and likely The defect was not hidden or latent; the blobs of plaster on the laths were there plainly to be seen and would have put anybody, making a proper inspection, on their guard. In fact, there was an examination, although an inadequate one, by the person who made that report on Sept. 21 or 22 to Miss Otto's solicitors.

I think the remarks of GREER, L.J., on page 476, in *Bottomley* v. *Bannister* (5) are absolutely relevant and are unqualified by anything said in *Donoghue* v. *Stevenson* (9). Therefore, on the whole, I frankly say so with great regret, I am bound by the law as laid down in that case to hold that Mrs. Otto's claim fails.

The result is that there must be judgment for Miss Otto for £340 with costs, and there must be judgment against Mrs. Otto. I think, the right order is this, that in dealing with Miss Otto's costs, the costs of the doctor cannot be included, and I think in dealing with her costs she is only entitled to half the costs of the last day. Dealing with the costs which Mrs. Otto must pay, the order I propose to make there is that the defendants are entitled against her to the costs in so far as they have been increased by the addition of her claim. Now I do not propose to have an apportionment here—any general apportionment at any rate—but I think that in their costs the defendants ought to be entitled, as against her, to half their costs of the last day, because I think that the last day was about half and half on facts and on law. Of course, if there is any other respect in which the costs have been increased by the addition of that claim, they must be entitled to them. That will be dealt with by the taxing master, but I mean precisely what I say, that I think that they are only entitled to the costs in so far as they have been increased, because, except for the doctor and for half the last day, I do not think the trial of her claim involved one moment of time. Precisely the same evidence was wanted in the main claim, and I think that only in so far as the costs have really been increased by the presence of that claim are they entitled to have their costs against her. I think it will be of assistance to the taxing master if I deal with the costs of the last

day myself, because he cannot know and I do. I think that ought to be half and half; they are to pay half the costs of that day and Miss Otto must pay half the costs of that day, and the doctor will be disallowed.

Solicitors: *Sharpe, Pritchard & Co.* (for the plaintiffs); *Stanley Evans & Co.* (for the defendants).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

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